Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1999

DR. ARIE HAREL,

Petitioner,

vs.

DR. FRANCIS LAWRENCE and JOSEPH SENECA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State-employed professor has a cause of action under 42 U.S.C. § 1983 against high-ranking decisionmakers who denied his tenure application despite knowledge that discriminatory intent tainted the tenure review process?

LIST OF PARTIES

In addition to the parties named in the caption, Rutgers, the State University of New Jersey was a party before the district court and the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Arie Harel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is unreported and is reproduced in the Appendix at A-1. The district court issued a written opinion which is reported at 5 F.Supp.2d 246 (D.N.J. 1998). The district court's opinion is reproduced in the Appendix at C-1.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 4, 1999. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states, in part, "nor shall any State . . . deny any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

After being recommended for early promotion by his Department in 1990, Dr. Arie Harel was thrice denied promotion to the rank of Associate Professor — in 1990, 1993 and, upon remand of the 1993 denial, again in 1995. After the last denial and having exhausted the university grievance procedures, Petitioner brought this suit alleging that his Israeli national origin motivated the University's adverse action in violation of the Fourteenth Amendment to the U.S. Constitution.

STATEMENT OF FACTS

On a motion for summary judgment, the district court had to review the evidence in the light most favorable to the non-moving party and resolve all ambiguities and inferences in his favor. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The following facts are presented in this light.

1. Background

Petitioner, Dr. Arie Harel, an Israeli, is a world renowned operations management scientist focusing on queuing theory, a subset of probability and statistics. (JA-627-28 at ¶¶ 5-13). In 1985, he commenced teaching at Rutgers' Graduate School of Management, Newark campus. (JA-627, 628-29 at ¶¶ 10, 20).

2. The tenure review process at Rutgers

Rutgers employs a multi-tiered tenure review process. (C-4-6). First, through reading and departmental committees, the candidate's department reviews his comprehensive promotion packet. The department committee issues a report and votes on the tenure bid. The promotion packet is then submitted to the Dean's Advisory Appointment and Promotions Committee ("A & P Committee") comprised of four to five faculty members — two appointed by the Dean and two by the faculty. This Committee forwards a written recommendation to the Dean.

If the Dean or the Department favors the grant of tenure, the Promotion Review Committee ("PRC") reviews the promotion packet. Chaired by respondent Dr. Joseph Seneca, the PRC's task is to assure the College President that the prior process of peer review and judgement has integrity, *i.e.*, the peer evaluators are "at the leading edge of their fields, that appropriate evidence and analysis have been presented of

accomplishment and impact on the field to support these judgments, and the dean has applied the highest, University-wide standard of quality." (JA-142). The PRC forwards a written recommendation to the President, respondent Dr. Francis Lawrence, who, in turn, evaluates the promotion packet and makes a recommendation to the Board of Governors, which makes the final tenure decision.

If the tenure candidate is dissatisfied with the final decision, he may file a grievance, the result of which may, as here, be a remand and re-review. If the candidate is denied tenure following the remand, he may appeal to the Faculty Appeals Board, which may recommend a contrary result to the President.

3. Petitioner's tenure review

i. The 1992-93 tenure review process

For the 1992-93 tenure review process, Department Chair Dr. Nabil Adam, an Egyptian, was responsible for soliciting external letters, selecting the reading committee, encouraging a frank and open discussion and otherwise providing Petitioner a fair process that would reflect all available views about his candidacy. (JA-652 at ¶ 129).

Seven of the eight department members supported Petitioner for tenure and the department issued a positive report, noting that he "has made significant contributions in scholarship, is a solid teacher and provides service to the profession and the University." (JA-181). The abstainer in 1992, Professor Douglas Jones, explained in an affidavit that he so voted because the reading committee report, tainted as explained below, raised concerns in his mind about Petitioner's candidacy.[1]

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[1] After reviewing Petitioner's record during the 1994-95 remand, Dr. Jones strongly supported Petitioner's bid for promotion. (JA-691-97).

In 1992-93, Petitioner's promotion packet included 14 laudatory letters from external evaluators. Ten of these explicitly supported Petitioner for tenure; none opposed his candidacy. (C-7). One scholar deemed Petitioner "the number 1 expert in the study of convexity in queuing systems." Another ranked him "in the top twenty percent of Assistant Professors coming up for promotion to Associate Professor at research-oriented Universities[.]" While some evaluators were concerned about Petitioner's relatively few publications, most agreed that Petitioner's work had appeared in top journals. (C-7).

The A & P Committee voted unanimously to recommend Petitioner for tenure, specifically noting, "[c]ollectively, we can think of no other colleague at this stage of his career who has opted so singlemindedly and relentlessly for *only* top-notch results and journals. (Several of his outside letters also noted that his forte is quality of results and prestige of publication outlets)." (JA-876-79).

Despite this support, through respondent Seneca, the PRC recommended that Petitioner be denied tenure, citing "a moderate publication level" and "some concern about the long term significance and impact of his work." (C-8). Respondent Lawrence and the Board of Trustees concurred with the PRC evaluation and denied Petitioner tenure. *Id.*

ii. 1993 grievance

Petitioner grieved the 1992-93 denial as arbitrary and capricious. (JA-1721).

After a lengthy hearing, the Grievance Committee concluded that personal enmity by Professor Szatrowski, whom Dr. Adam had selected to serve on Petitioner's two-person "reading committee," had tainted the promotion process. The Grievance Committee noted that "proof of enmity [is] established when there is (a) an act or pattern that could be interpreted as hostile or capricious; and (b) evidence that the act or pattern was the result of hostility and/or capriciousness."

(JA-188). At a minimum, "[t]he acts that constitute enmity must include prejudgement." (JA-1989).

The Committee unanimously found that, contrary to his meticulous review standards and in an effort to produce a negative departmental outcome, Dr. Szatrowski committed a pattern of capricious actions, including the deliberate omission of positive references in the reading committee report. (JA-1989-93). Dr. Szatrowski also misrepresented the citations to Petitioner's work and lobbied others to reject him for tenure. (JA-1989-90). On the basis of these and other examples, the Grievance Committee concluded that "[P]rejudgement and capriciousness may account for the nature of the reading report" and "hostility towards the candidate is the most credible explanation for [the] pattern of actions." (JA-1989).

The Grievance Committee also concluded that the other member of the department's reading committee, Dr. Michael Katehakis, had "negatively prejudged Harel's capabilities" and had acted in an "inappropriate" manner. (JA-192-93). The Grievance Committee found "evidence of bias" by this reviewer and added that Dr. Katehakis "did not appear willing to commit the time and effort to perform an independent and thorough review of Petitioner's work and to write his view in his own words." (JA-192).

In addition, the Grievance Committee concluded that departmental chairperson Adam had (a) failed to transmit relevant procedural requirements concerning review of evaluative letters (JA-190); (b) failed to properly consider the consequences of transmitting a questionable and adverse memorandum (JA-191) and (c) departed from the usual practice of including a minority report to represent dissenting views. (*Id.*).

The following procedural irregularities also marred the 1992-93 tenure review process:

¶ While University regulations required Dr. Adam to appoint "qualified" persons to serve on the reading committee (JA-756) and Petitioner requested that the committee include only persons with some knowledge of queuing theory (JA-656-57 at ¶¶ 144-46; JA-1999), Dr. Adam selected two unqualified department members for this pivotal committee;

¶ Dr. Adam failed to solicit an adequate number of external letters as evidenced by responses from several outside referees indicating they lacked the time or expertise to prepare a detailed recommendation (JA-658 at ¶¶ 157-59; JA-918, 923);

¶ Contrary to University regulations, without permission, Dr. Adam materially deviated from the sample solicitation letter, promising greater confidentiality than the process required and asking evaluators to assess Petitioner's professional standing in the academic community (JA-659 at ¶¶ 165-66; JA-1660; JA-686 at ¶¶ 33-35). Dr. Adam's letter had the effect of de-emphasizing the need for a detailed analysis of Petitioner's work by focusing analysis on Petitioner's standing in comparison with others in his field (JA-659 at ¶ 167);

¶ Dr. Adam failed to ask, as is usual practice, whether the outside referee was willing to submit a detailed and substantive letter before he mailed out solicitation letters (JA-687 at ¶ 35);

¶ Dr. Adam inaccurately reported Petitioner's research record in the departmental narrative and, instead, over-emphasized aberrant, negative comments of a single peer reviewer (Dr. Shaler Stidham) selected by Dr. Adam despite knowledge that Petitioner and Dr. Stidham had a serious professional dispute over the latter' acceptance, as a journal editor, of referee reports that were biased against Petitioner's work (JA-927-28; JA-877-78; see generally, JA-654-55 at ¶¶ 134-36);

¶ Dr. Adam asked one of Petitioner's co-authors, Dr. Alan Stulman, to understate Petitioner's role on a joint research project. While Dr. Stulman told Dr. Adams that Petitioner's efforts were "overwhelmingly importan[t]," Dr. Adam told Dr. Stulman to "describe your efforts as 50-50." (JA-1653).

¶ In addition, in 1992-93, the A & P Committee rewrote its prior reports on Petitioner in a manner that downplayed his accomplishments. (JA-1736-38). For example, in the 1990-91 report, the evaluators noted that Petitioner's "very significant" letter appeared in an academic journal which published substantive letters. In 1992, the Committee merely wrote, "[H]is letter to the Editor extends a result of Smith and Diaconis (1988)." (JA-1737).

Like Petitioner's tenure review at the departmental level, procedural irregularities riddled the grievance process.

Although the grievance panel for faculty in the Graduate School of Management is to include only members of that school or the other professional schools at the Newark campus, Petitioner's was not so composed. (JA-671 at ¶ 229; JA-2428-31).

Moreover, although Article X of the Collective Bargaining Agreement allows the University and the grievant to each choose a member of the "neutral reader" committee (JA-384 at b.1.k.[3]), the University's Representative handling Petitioner's grievance, Dr. Norman Schnayer, Associate Provost of the Newark campus, initially rejected Petitioner's choice, an Israeli, Dr. Fred Sudit, even though Dr. Sudit did not participate in Petitioner's evaluation and Dr. Schnayer conceded that Dr. Sudit would be a "fair and impartial reader." (JA-672 at ¶¶ 231-35; JA-1995-96). The University also rejected Petitioner's choice of a second Israeli, Dr. Benjamin Avi-Itzhak, who was also eligible to serve on the committee, and is the University's pre-eminent scholar in queuing theory. (JA-672 at ¶ 232).

The parties resolved the grievance by remanding Petitioner's 1992-93 evaluation to correct the deficiencies at the departmental level. (JA-673 at ¶ 239; JA-1980). This agreement

froze the process at 1992-93 and, aside from updated materials, only documents from 1992-93 (and certain materials from 1991-92) could be considered on the remand review. (JA-673 at ¶ 240; JA-1980).

iii. The 1994-95 remand

As stated above, Petitioner's tenure candidacy was remanded in 1994-95. His promotion packet included updated scholarship materials, the records considered in connection with his 1992-93 candidacy and the grievance findings. (C-10).

The department's reading committee applauded Petitioner's work, noting that "the impact of Harel's results is well-felt. The number of citations Harel received is impressive, indicating the importance of his results. Moreover, this citation pattern by well-known authors who not only mention his results but make *direct use* of them to derive new results. This is perhaps the best indication for the impact of the results on the field." (JA-97) (emphasis in original). The committee concluded, "Harel demonstrated depth as well as breadth. He has established himself and conducted very successful and recognizable research in *several* areas. His impact on the field is very significant." *Id.* (emphasis in original).

Despite this ringing endorsement, the department split 4-3 with one abstention, depriving Petitioner of the required two-thirds support needed for a positive tenure recommendation. (JA-675 at ¶ 249).

Importantly, Petitioner was denied stronger departmental support for reasons unrelated to the strength of his qualifications. Deviating from substantive principles, Dr. Adam falsely led department members to believe that Petitioner had breached the confidentiality of the tenure process. (JA-69-70 at ¶¶ 214-23). Although Petitioner was not charged with breaching confidentiality and he had no opportunity to defend himself against this innuendo (JA-670 at ¶ 220), these rumors affected his tenure candidacy and internal memoranda at the

University's highest levels cited Petitioner's alleged transgression. (JA-1704-1705, 2118).

Although Petitioner accepted the remand agreement in reliance on promises that Drs. Adam and Szatrowski would not participate in the remand (JA-673 at ¶¶ 241-42), the administration allowed Dr. Adam to participate in the remand review. (JA-322).

As in 1992-93, the department violated the University's promotion procedures. This time, the department narrative failed, as is obligatory, to explain its adverse recommendation. (JA-675 at ¶ 251; JA-959-61). As the district court noted, during the 1994-95 remand review, Dr. Adam conducted the departmental vote by secret ballot, even though such votes are usually open (C-11), making voters accountable. (JA-2115).

In addition, department members omitted from the departmental analysis any mention of the three dissenting (negative) votes (cast by Drs. Adam, Surkis and Carroll) on the stereotypic ground that Petitioner would be "confrontational" toward those who disfavored his candidacy. (JA-675 at ¶ 252; JA-2100). The district court noted that this omission violated University procedures. (C-11).

The A & P Committee also supported Petitioner for tenure, evaluating his scholarship as "outstanding." (C-11). Notably, this committee observed that "the narrative summary of the departmental recommendation . . . reflects the division of opinion in the department. It paints a positive picture of Harel's work, but many of the positive statements, especially in the case of scholarship, are presented as the opinion of only 'some of the tenured members of the Department.' The report gives no explanation of the negative votes and makes no case for a negative recommendation." (JA-988-89).

Even a professor whom the Grievance Committee found had exhibited enmity against Petitioner in the course of the 1992-93 review process, Dr. Szatrowski, urged the Faculty Appeals Board in 1995 to grant Petitioner tenure. (JA-2114). In his letter to the FAB, Dr. Szatrowski detailed some of the procedural violations tainting the tenure review process and stated that Dr. Adam had failed to advise the department of Petitioner's version of events concerning his alleged confidentiality breach, discussed above. (JA-2115, 2118).

Following the A & P Committee, the Dean recommended Petitioner for tenure since Petitioner had published in "leading journals" in the field and "very few faculty members ever achieve this record of publication in these journals by the time they are reviewed for tenure." (JA-977-78).

However, through Dr. Seneca, the PRC again rejected Petitioner for tenure, claiming that Petitioner had failed to demonstrate sufficiently substantial scholarly productivity. The PRC also concluded that Petitioner's work lacked significant national impact on developments in the field. (JA-208).

iv. 1995 grievance and FAB report

When the 1994-95 promotion round concluded, Petitioner appealed his denial to the Faculty Appeals Board, a group appointed by respondent Dr. Lawrence. (JA-2006).

Addressing Petitioner's concern that the Department "change[d] from a positive to a negative vote between 94-95 and 92-93," the FAB noted that "[t]he reasons for the gradual erosion of departmental support are not explained. The FAB finds this disturbing, but has no mechanism to determine whether this was arbitrary and capricious." (JA-213). The FAB also noted that the University had mishandled several outside letters which had favorably reviewed Petitioner's work.

The FAB recommended that the University promote Petitioner with tenure, stating:

> The Faculty Appeals Board feels that this candidate deserves promotion to Associate Professor with tenure. *There are many disturbing facts in this case.* Letters from outside reviewers have not been handled with requisite care. Timely receipt of outside letters from professors Larson and Weber, for example, might have convinced the PRC in 1990-91 to recommend promotion. *This case includes documented cases of enmity, disqualification of certain individuals from the reading and the promotion process and the failure of the department to explain the erosion of support for professor Harel, especially in light of an outstanding reading report documenting his scholarship during the remand process.* Unsubstantiated rumors with regard to Professor Harel's access to confidential outside letters may have adversely influenced the 1994-95 remand vote. (JA-219) (emphasis supplied).

This was the first time the FAB had ever recommended a candidate for tenure. (JA-718 ¶ 2).

v. The President's decision to deny Petitioner tenure

In a letter dated July 26, 1995, the University President, respondent Dr. Lawrence, ignored the FAB recommendation and denied Petitioner tenure. The President noted that he had "carefully reread [Dr. Harel's] promotion packet." (JA-220).

vi. The decisions below

The district court held that Petitioner had made out a *prima facie* case of national origin discrimination. However, the court held that Petitioner had not established that a rational factfinder could conclude that (a) the University's articulated reasons for denying him tenure were pretextual or that (b) an invidious discriminatory reason was more likely than not a motivating factor or determinative cause of the adverse action. The court also held that Petitioner did not establish that an anti-Israeli policy and practice resulted in his tenure denial.

The Court of Appeals affirmed. Although the court largely addressed Petitioner's reverse gender discrimination claim, concluding that he did not make out a *prima facie* case, in a footnote, the Third Circuit rejected his § 1983 claim, concluding, *inter alia*, that he failed to produce evidence that respondents "had actual knowledge of any discriminatory conduct against him or that they acquiesced in any such conduct." (A-4 n.2).

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW CONFLICT WITH WELL-ESTABLISHED SUPREME COURT AND INTER-CIRCUIT AUTHORITY THAT DECISION-MAKERS ARE LIABLE UNDER 42 U.S.C. § 1983 FOR RECKLESSLY ACQUIESCING IN DISCRIMINATORY CONDUCT

In affirming summary judgment, the Third Circuit stated that Petitioner failed to produce evidence that respondents had actual knowledge of any discriminatory conduct against him or that they acquiesced in the same. Since this holding ignores well-settled Supreme Court and inter-circuit authority governing supervisory liability under § 1983, certiorari is warranted.

In this case, two settled equal protection and § 1983 principles intersect: (1) departures from procedural and substantive guidelines are tell-tale signs of discrimination and (2) decisionmakers who ratify discriminatory conduct are liable for that conduct.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977), this Court counseled that civil rights plaintiffs may prove discriminatory intent by highlighting material deviations from substantive and procedural criterion. The Circuit Courts (including the Third Circuit) have found liability under *Arlington Heights* in academic tenure cases. *See*, *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984) ("Tenure decisions are not exempt under Title VII, however, and plaintiffs seeking to show that forbidden purposes lurk in a tenure decision have available methods of challenging such decisions. Departures from procedural regularity, such as a failure to collect all available evidence, can raise a question as to the good faith of the process where the departure may reasonably affect the decision"); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 433-34 (3d Cir. 1997) (reversing summary judgment in Title VII tenure

discrimination case where a University grievance board determined that factual and procedural inconsistencies infected the process leading up to tenure denial).

This Court has also held that governmental officials may be liable under § 1983 for deliberate indifference to constitutional rights. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Although *Canton* specifically addressed the unconstitutional failure to train municipal employees, the Circuit courts have applied the "deliberate indifference" test in other contexts, including the ratification of unconstitutional conduct or the conscious failure to correct it. *See, e.g., Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (supervisor's liability may be based upon his direct participation in the constitutional violation; failure to remedy a wrong once learning of it; deliberate indifference "by failing to act on information indicating that unconstitutional acts were occurring" or grossly negligent supervision of subordinates).

However, the Circuits have not agreed on the scope of *Canton's* deliberate indifference test. Importantly, the Third Circuit has expressly applied a narrower liability test than other Circuits. Certiorari is warranted to resolve this dispute.

In *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995), the Third Circuit noted the split in inter-Circuit authority in assessing supervisory liability under *Canton*. *Baker* held that a § 1983 plaintiff alleging police misconduct proffered sufficient evidence to survive summary judgment, concluding, "[t]his evidence satisfies at the summary judgment stage the standard our cases require for supervisory liability, that is 'actual knowledge and acquiescence.'" *Id.* at 1194 (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990)).

However, in a footnote, the Third Circuit stated, "We note that other circuits have developed broader standards for supervisory liability under section 1983. For example, the Eighth Circuit has held that 'actual knowledge is not an absolute prerequisite' and that 'reckless disregard on the part of a supervisor will suffice.'" *Id.* at 1194 n.3 (citing *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993); *Febus-Rodriguez*

v. Betancourt-Lebron, 14 F.3d 87, 92 (1st Cir. 1994); *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986)). In *Hall*, the Eighth Circuit noted that it "has consistently held that reckless disregard on the part of the supervisor will suffice to impose liability. This requires 'more than mere negligence yet less than malicious or actual intent.'" 887 F.2d at 138 (citations omitted).

In affirming the district court, the Third Circuit concluded that Petitioner "did not produce evidence that President Francis Lawrence and Vice-President Joseph Seneca, the individual defendants, *had actual knowledge of any discriminatory conduct or that they acquiesced in any such conduct and as a result Harel failed to establish his § 1983 claim.*" (A-4 n.2) (emphasis supplied). This reasoning tracked the Third Circuit's narrow "deliberate indifference" test. *Baker*, 50 F.3d at 1194, n.3. Under the broad standard applied in other circuits, Petitioner would have survived summary judgment.[2]

Concluding a review process that even the Faculty Appeals Board deemed sufficiently procedurally defective to warrant grant of tenure, both Drs. Seneca and Lawrence opposed Petitioner's tenure bid after reviewing his tenure packet which revealed a myriad of procedural and substantive violations Settled Third Circuit authority, faithfully applying *Arlington Heights*, holds that universities violate the civil rights laws by departing from procedural guidelines in denying tenure to minority candidates who otherwise make out a *prima facie* case of discrimination.

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[2] The Court of Appeals also held that Petitioner's claim for the 1993 tenure denial was time-barred. (A-4 n.2). However, since Petitioner's tenure application was remanded following that denial, it was part of the same process that resulted in his 1995 tenure denial. The 1993 denial does not form the basis for a separate claim. In any event, even if the former denial was time-barred, it would constitute relevant evidence as to respondents' subsequent discriminatory intent. *See, United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

In *Stewart*, *supra*, another recent Rutgers tenure case alleging invidious discrimination, the Third Circuit held that a grievance committee report concluding that the plaintiff's tenure denial was "arbitrary and capricious" constituted circumstantial evidence sufficient to establish that invidious discrimination more likely than not motivated the adverse action. 120 F.3d at 434 (citing *Arlington Heights*, 429 U.S. at 267). Dr. Stewart filed suit after her 1994-95 tenure denial. Although the grievance committee report only addressed the 1992-93 tenure rejection, the Third Circuit deemed it sufficient to support her discrimination claim arising from the 1994-95 denial. *Id.* (citation omitted).

Here, based on the record before them, Drs. Seneca and Lawrence had every reason to believe that Petitioner was a superlative candidate for promotion and that the tenure review process was materially flawed. Outside reviewers extolled Petitioner's standing among his peers. They spoke of his substantial research contributions and their impact. Both high-ranking university reviewers also knew that Petitioner had previously been victimized by personal enmity by members of his department and had every reason to know, through his extensive submissions, that this enmity had continued and, indeed, worsened.

Specifically, respondents knew that the FAB, the highest-level University grievance panel, had identified a myriad of procedural and substantive deficiencies adversely affecting Petitioner's tenure review process. This report suggested the existence of bias and prejudice. The FAB was so disturbed by these errors that it offered an unprecedented tenure recommendation. Dr. Lawrence appointed the FAB and he had to review all relevant materials before ruling on Petitioner's tenure bid. As well, Dr. Seneca, who heads the PRC, must review the promotion packet and is mandated to assure Dr. Lawrence that the process of peer review and judgment has integrity. As courts have noted in tenure discrimination case, where "each successive decisionmaker had before it the decisions and reports of the prior levels . . . , any decision which itself was infected with discrimination in turn would

have tainted the entire process." *Roebuck v. Drexel University*, 852 F.2d 715, 734 (3d Cir. 1988). *See also*, *Zahorik*, 729 F.2d at 92-93 ("[U]niversity tenure decisions are usually decentralized. The decision at the departmental level is of enormous importance . . . [T]he deference given to departmental decisions grows as a case travels up the chain of authority. . . . [T]he number of factors considered in tenure decisions is quite extensive . . . Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship").

By itself, the FAB's report should have placed these individuals on notice about the integrity of Petitioner's tenure review. The grievance panel raised serious questions that established that the process was untrustworthy since departures from procedural *and* substantive principles could well have resulted from a desire to "cut corners" and justify the denial of a worthy tenure candidacy. The FAB's unique recommendation that the University grant Petitioner tenure confirmed that the procedural and substantive irregularities affected the outcome. *See*, *Stern v. Trustees of Columbia University in City of New York*, 131 F.3d 305, 313 (2d Cir. 1997) ("departures from procedural regularity . . . can raise a question as to the good faith of the process where the departure may reasonably affect the decision").

However, the FAB report was only the tip of the iceberg. Respondents knew better than to rely on the flawed tenure review since written evidence revealed that stereotypic considerations governed opposition to Petitioner's promotion. Notably, some peer reviewers deviated from procedural requirements in 1994-95 by omitting their negative evaluations to avoid a confrontation with Petitioner. This stereotypic fear exposes decisionmaker bias against Petitioner, an Israeli. Indeed, the University's representative handling Petitioner's grievance knew that the Neutral Reader's Report alleged that Petitioner's tenure process had been discriminatory. As the Third Circuit has itself noted, a fact-finder may conclude that a decision-maker who allowed bias to influence one decision

also allowed bias to affect other, related decisions. *Roebuck*, 852 F.2d at 734.

Notwithstanding the above indicia establishing that University officials at nearly every level undercut Petitioner's tenure candidacy and that high-ranking officials knew that Petitioner believed that illegal discrimination motivated the adverse decisions, respondents rejected his candidacy and recklessly ratified the discrimination previously internalized in the process. As such, in light of Petitioner's *prima facie* case, a rational factfinder could hold these respondents liable for national origin discrimination under § 1983.

In sum, this Court should resolve the inter-circuit split which resulted in the dismissal of Petitioner's claims. Respondents recklessly ratified the discriminatory denial of Petitioner's tenure candidacy; they are liable under § 1983. As the broader liability standard applied in other Circuits would have compelled a contrary result, certiorari is warranted.

CONCLUSION

For the foregoing reasons, this writ of certiorari should be granted.

Dated: October 27, 1999
Goshen, New York

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DR. ARIE HAREL,

Appellant, **No. 98-6086**

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY; DR. FRANCIS LAWRENCE; JOSEPH SENECA

Argued February 16, 1999

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Action No. 95-cv-05137)

District Judge: Honorable William H. Walls

Before: GREENBERG, ROTH, and LOURIE[1], *Circuit Judge*

(Memorandum Opinion filed August 4, 1999)

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[1] Honorable Alan D. Lourie, United States Circuit Judge for the Federal Circuit, sitting by designation.

MEMORANDUM OPINION

ROTH, Circuit Judge:

I.

The plaintiff-appellant, Dr. Arie Harel, grew up in Israel and is a citizen of that country. He is a specialist in operations management, focusing on queuing theory, a subset of probability and statistics. Harel began teaching at Rutgers University Graduate School of Management (GSM) in 1985, as an Adjunct Assistant Professor, and was appointed Assistant Professor in 1987. He was first considered for tenure in 1991. Tenure was denied. During the 1992-93 academic year, Harel was again evaluated for tenure, and once again tenure was denied. Harel then filed a grievance, pursuant to the University's agreement with the American Association of University Professors (AAUP), to protest his denial of tenure. The grievance was resolved by remanding Harel's promotion packet to his department for another evaluation. The remand agreement provided that the decision on remand would be based on the 1993 tenure materials, plus an update of Harel's works in progress and a personal statement. Harel's updated scholarship since the 1992-93 evaluation consisted of one new publication and the acceptance for publication of one previously-listed paper.

After reconsideration on remand, both the Dean's Advisory Committee on Appointments and Promotions (A & P) and the Dean himself recommended that Harel be promoted. The Promotion Review committee (PRC), however, advised the President of the University that the PRC did not recommend that Harel be given tenure. On April 14, 1995, the University notified Harel that he had been denied tenure.

Harel filed a second grievance, which was reviewed by the Faculty Appeals Board (FAB). The FAB rejected Harel's allegations of arbitrary and capricious action by the PRC. The FAB recommended nevertheless that Harel be granted tenure. The President of the University, however, decided not to give Harel tenure because Harel's "record of accomplishments presented is not sufficient to support a different conclusion."

Harel filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on September 13, 1995, claiming that he was denied tenure in 1995 on account of gender and of national origin discrimination. He contended that the University, in the Graduate School of Management, applied harsher standards of review to male and Israeli candidates for tenure. On October 6, 1995, Harel filed suit in federal court, alleging a § 1983 claim based on denial of substantive due process in the tenure review process in 1992-93 and in 1994-95 because of his Israeli national origin. On August 9, 1996, after he had received his Notice of Right to Sue from the EEOC, Harel filed an Amended Complaint, adding a Title VII gender discrimination claim. The defendants contend to the contrary that Harel was denied tenure because of the deficient quality of his scholarship. On April 24, 1998, the District Court granted summary judgement to his defendants on all claims. Harel appealed.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction of the appeal under 28 U.S.C. § 1291. Our review of the District Court's summary judgement is *de novo*. *Sempier v. Johnson & Higgins*, 45 F.2d 724 (3d Cir. 1995).

II.

One of the grounds of Harel's appeal is that the District Court employed an improper standard in granting summary judgement to defendants on the Harel's Title VII claim of gender discrimination in connection with his 1994-95 denial of tenure. We conclude that, because Harel conceded before the District Court that it was applying the appropriate standard for reverse discrimination cases, he waived his right to object to that standard on appeal. In addition, even if we were to find that Harel had established a *prima facie* case of gender discrimination, summary judgment for the defendants would still have been proper because Harel did not prove that there remained a material issue of fact as to pretext. For these reasons, and because we find the other issues raised by appellant to be without merit, we will affirm.[2]

On the issue of Harel's Title VII gender discrimination claim, the District Court determined that, in view of the fact that plaintiff is male and alleges reverse discrimination, he has the burden of showing that Rutgers University is "that unusual employer who discriminates against the majority." *Harel v. Rutgers, State University*, 5 F.Supp.2d 246, 264 (D.N.J. 1998) (quoting *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C.Cir. 1981)). This is a heightened

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[2] The other rulings of the District Court, which the appellant challenges, are that the claim for the 1993 denial of tenure is time barred and that material issues of disputed fact exist with regard to the § 1983 claim for national origin discrimination. We will affirm these rulings because we find (1) that the two incidents of denial of tenure, one in 1993 and the other in 1995, do not form an on-going pattern of discrimination and as a result the 1993 claim is barred; and (2) that Harel did not produce evidence to indicate that his deprivation of tenure was a direct result of an official Rutgers policy or custom against persons of Israeli national origin and he did not produce evidence that President Francis Lawrence and Vice-President Joseph Seneca, the individual defendants, had actual knowledge of any discriminatory conduct against him or that they acquiesced in any such conduct and as a result Harel failed to establish his § 1983 claim.

standard from the standard set forth in *McDonnell Douglas v. Green*. The Supreme Court noted in *McDonnell*, however, that the elements necessary to establish a *prima facie* case of discrimination are "flexible" and should be adjusted to fit the circumstances of each case.[3] 411 U.S. 792, 802 n.13 (1973). The District Court held that in order to establish his *prima facie* case, Harel had the additional burden of presenting background circumstances supporting the allegation that Rutgers is the unusual employer that discriminates against males when granting tenure. The District Court then ruled that Harel had failed to meet this burden.

In opposing Rutgers' motion for summary judgment, Harel accepted the "unusual employer" standard as being applicable in reverse discrimination cases. *See Harel*, 5 F.Supp.2d at 265 (stating that "[b]oth parties agree in their briefs that this is the proper standard to apply."). Nevertheless, on appeal, Harel has argued that the regular *McDonnell Douglas* presumptions should apply. Because a failure to raise an issue in the district court constitutes a waiver of the argument, Harel waived any objection that he now has to the application by the District Court of the "unusual employer" standard. *Brenner v. Local 514, United Bhd. Of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991).

Moreover, even if we were to accept that Harel had established a *prima facie* case of discrimination, we would still affirm the decision of the District Court to grant summary judgment to the defendants because Harel did not prove that there was a material issue of fact as to pretext. The final part of the *McDonnell Douglas* burden shifting standard deals with the question whether the reason, given by the employer for its treatment of plaintiff, was pretexual.

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[3] The *McDonnell Douglas* standard requires first that the plaintiff establish he or she is a member of a protected class. The burden then shifts to the defendant to articulate a legitimate reason for plaintiff's treatment. The burden then shifts back to the plaintiff to demonstrate that defendant's explanation was pretexual. *See, e.g., Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 252-54 (1981).

On the issue of pretext, Harel points out that in January 1992 the University President had advised the Graduate School of Management that it had underutilized females in its hiring practices during the past ten years, that the GSM must make an effort to recruit female and minority candidates,[4] JA at 2146, and that the GSM adopted this policy. JA at 2151, 2155.

An admonition to recruit women because of the existing imbalance would not appear, however, to be evidence that historically Rutgers has discriminated against males, but rather, to the contrary, it is evidence that Rutgers has been deficient in hiring female faculty members. Moreover, the fact that Rutgers wished to encourage the hiring of women did not indicate that the standards for hiring women were in any way different from the standards for hiring men. Nor is an effort to recruit women evidence that the tenure selection process is weighted against males. Tenure eligibility comes only after several years of employment as a faculty member – and Harel is complaining not that he was not hired, but rather, that he was not granted tenure.

Harel also contends that the fact that Dr. Lei Lei, a female operations management scientist in his department, was granted tenure instead of him creates an inference of discrimination. Dr. Lei, however, was granted tenure in 1996, the year after Harel's final rejection. Nonetheless, Harel stated at his deposition that Dr. Ronald Armstrong, a member of Harel's department, had told Harel that "it is much tougher to get tenure at Rutgers for male, white male, than for female." Harel went on to testify, however, that Armstrong did not make this comment with respect to Dr. Lei's receiving tenure. JA at 2307. Nor is there any other validation of Armstrong's statement. Indeed, the statistics of the granting of tenure at Rutgers do not indicate that any preference has been given to female candidates. In 1993, males comprised 47 of 68, or 69%, of the candidates for

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[4] At that time, women comprised 8.6% of the GSM faculty.

promotion to Associate Professor with tenure, and they comprised 27 of 38, or 71%, of the successful candidates. In 1995, males comprised 102 of 134, or 76%, of candidates for promotion to Associate Professor with tenure, and they comprised 31 of 45, or 69%, of the successful candidates. In 1993 and 1995, there were nine tenured professors in Harel's department, eight of whom were male. In 1993, the total tenured faculty at Rutgers was 77% male and in 1995, 76% male.

We conclude that the stray comment by Dr. Armstrong and the example of Dr. Lei's receiving tenure,[5] taken from a different time period, are not sufficient to establish an issue of material fact that the reasons given by defendants-appellees for Harel's treatment were pretexual.

For the reasons stated above, we will affirm the judgement of the District Court.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

Jane R. Roth
Circuit Judge

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[5] Harel also argued before the District Court that the 1992 promotion to full professor of Dr. Rosa Oppenheim, the only tenured female in Harel's department, was evidence that females were given less stringent review. However, comparing the standards for granting tenure to the standards for the promotion of tenured faculty members is like comparing apples to oranges.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DR. ARIE HAREL,

Appellant,

No. 98-6086

v.

Argued
February 16, 1999

RUTGERS, THE STATE
UNIVERSITY OF NEW JERSEY;
DR. FRANCIS LAWRENCE;
JOSEPH SENECA

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Action No. 95-cv-05137)

Before: GREENBERG, ROTH, and LOURIE[6],
Circuit Judge

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[6] Honorable Alan D. Lourie, United States Circuit Judge for the Federal Circuit, sitting by designation.

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on February 16, 1999,

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated May 12, 1998, be and the same is hereby affirmed.

Costs to be taxed against appellant.

ATTEST:

/s/

Clerk

Dated: August 4,1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Dr. ARIE HAREL

Plaintiff,

– v. –

RUTGERS, THE STATE UNIVERSITY, PRESIDENT FRANCIS LAWRENCE, Dr. JOSEPH SENECA,

Defendants.

Civ. No. 95-5137 (WHW)

ORDER

Walls, District Judge

This matter arises on the motion of defendants Rutgers, Rutgers President Francis Lawrence, and Dr. Joseph Seneca for summary judgment dismissing plaintiff Dr. Arie Harel's Complaint. Upon consideration of the submissions of the parties and for the reasons stated in the accompanying opinion, the Court rules as follows:

The Court **grants** defendants' motion for summary judgment and dismisses **with prejudice** all claims against them.

SO ORDERED:

/s/

William H. Walls, U.S.D.J.

24 April 1998

Dated

Because plaintiff has no such protected property or liberty interest, the defendants did not violate the Due Process Clause through their actions. Harel's substantive due process claim is also dismissed.

Conclusion

For the foregoing reasons, the Court grants summary judgment to Rutgers, Seneca, and Lawrence and dismisses all claims against them.

SO ORDERED:

/s/

William H. Walls, U.S.D.J.

24 April 1998

Dated

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Dr. ARIE HAREL,

Plaintiff.

– against –

RUTGERS, THE STATE UNIVERSITY, PRESIDENT FRANCIS LAWRENCE, Dr. JOSEPH SENECA,

Defendants.

Civ. No. 95-5137 (WHW)

OPINION

Walls, District Judge.

Dr. Arie Harel ("Harel") brings this civil rights action against Rutgers, the State University of New Jersey ("Rutgers" or "the University"), Dr. Joseph Seneca, Vice President for Academic Affairs ("Seneca"), and Dr. Francis Lawrence, President of Rutgers ("Lawrence"). Harel alleges that the defendants denied him tenure on account of his Israeli national origin and gender in violation of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Defendants have moved for summary judgment. Under Fed.R.Civ.P. 78, the Court decides this motion without oral argument by counsel. For the following reasons, the Court grants summary judgment to all defendants.

Factual and Procedural History

I. The Parties

Harel is an operation management scientist who was born in Liberitz, Czechoslovakia October 9, 1946. When he was six months old, he was taken to Israel[1] and became an Israeli citizen upon the declaration of that nation's statehood in 1948. In 1980, Harel came to the United States to begin doctoral studies at Columbia University. He joined Rutgers as an adjunct assistant professor in September 1985 and, after receiving his doctorate degree in management science, became an assistant professor in the Quantitative Studies Department[2] at the University's Graduate School of Management in 1986 or 1987.

Defendant Seneca, the University's Vice President for Academic Affairs, served as chair of the Promotion and Review Committee during plaintiff's 1992-93 and 1994-95 tenure evaluations. Defendant Lawrence is the President of Rutgers. He opposed Harel's tenure bid on several occasions.

II. The Tenure Evaluation Process at Rutgers

Rutgers utilizes a multi-level evaluation process to determine whether to award tenure to members of its faculty. The University Policy with Respect to Academic Promotions (the "Policy") provides that teaching, scholarship, and service should be considered in deciding whether to grant tenure:

> For general teaching/research faculty, scholarship, including research accomplishments, is the primary criterion. Excellence in scholarship . . . is necessary to

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[1] At that time, Israel had not yet become an independent nation and the territory that is now known as Israel was the British mandate of Palestine.

[2] The name of this department has since changed to Management Science and Computer Information Systems.

> the achievement of tenure; effective teaching . . . is also normally a condition for the achievement of tenure. Only in rare instances where an individual's scholarship has enabled his/her teaching to achieve national recognition, that is, to make an impressive and recognized impact on teaching in the discipline as a whole, not limited to this University, may teaching become a basis for tenure. Significant accomplishments in the activities specified under the criterion of service will strengthen a candidacy for tenure. Such accomplishments are expected in a member of the profession, but cannot replace scholarship and research or teaching effectiveness as a justification for tenure.

See John J. Peirano Certif. ("Peirano Certif."), Exh. A at 6. The Policy further provides that only "[t]hose faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for [tenure]. . . . Advancement to a higher rank is not automatic." *Id.* at 4.

The defendants contend that Harel was denied tenure because of the deficient quality of his scholarship. *See* Defendants' Rule 56.1 Statement ¶ 6. The Policy outlines how scholarship should be evaluated in the making of tenure decisions:

> [S]cholarship, as measured by peer recognition of its originality, impact on, and importance to the development of the field, is demonstrated most typically by refereed publications, such as journal articles and books of high quality. Scholarship and research accomplishments are also demonstrated by the design and execution of applied research in the laboratory or in the field; through the presentation of papers at organized scholarly meetings, usually at the national or international level; through the attraction of external support or competitive fellowships and awards appropriate to the faculty member's field of

> study; through such activities as editing, . . . the compilation of information, and the development of materials that make information more assessable to researchers, other scholars, and practitioners; and through publication in other academic or professional journals and lecturing in professional and other public forums.

Peirano Certif., Exh. A at 2. According to Ronald Armstrong, the current chair of plaintiff's department, the factors employed to assess the impact of a candidate's scholarship include: (1) the quality of the journals in which the candidate's articles appear; (2) the frequency that the works are cited; (3) whether the work is published in refereed journals; (4) whether the work is co-authored; (5) the level of recognition of the work by the candidate's peers; (6) the number of publications; (7) whether the candidate has received awards for his scholarship; and (8) whether the candidate has published on subjects beyond his dissertation topic. *See* Santos Certif., Exh. 2 ¶ 13.

The Academic Reappointment/Promotion Instructions describe the procedures one must follow to seek tenure. *See* Peirano Certif., Exh. C.[3] The candidate prepares a promotion packet that generally consists of his/her *curriculum vitae* and additional documents and materials submitted in support of the application such as recently published works. The packet will include any confidential letters submitted by academics who are in the candidate's field outside of the University. The department chair is responsible for soliciting these required external letters of evaluation. *See id.*, Exh. C.

At the first level of the process, tenured faculty within the candidate's department review the promotion packet. The department chair may appoint a reading committee to prepare

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[3] Harel applied for tenure in the academic years 1990-91, 1992-93, and 1994-95. The Academic Reappointment/Promotion Instructions were substantially similar in each of these years. *See* Peirano Certif., Exh. C; Jean L. Ambrose Aff., Exh. A. For the purpose of simplicity, references will be made to the 1994-95 Instructions.

a written assessment of the candidate's scholarly work. The chair then convenes the departmental committee to discuss the candidate's qualifications and vote on the tenure bid. A positive recommendation requires approval of two-thirds of those voting. The department produces a report that reflects the majority and any minority views among the peer review group. *See id.*

The candidate's promotion packet and the departmental report are then submitted to the Dean's Advisory Committee on Appointments and Promotions ("A & P Committee"). The A & P Committee, formed of two faculty members appointed by the dean and two faculty members elected by the faculty, evaluates the promotion packet and makes a written recommendation to the dean. *See id.*

Then the dean evaluates these materials and makes his own independent recommendation of the merit of the tenure application. If his recommendation differs from that of the department, the dean must discuss the matter with the department chair before submitting his recommendation. *See id.*

If either the dean or the department favors the grant of tenure, the application materials are advanced to the Promotion Review Committee ("PRC"), which purpose is to advise the University President on appointments and promotions to positions of tenure. The PRC is chaired by Rutgers Vice President for Academic Affairs, defendant Seneca, a non-voting member. Its task is "to assure the President that the prior process of decanal judgment and peer review has integrity, in the sense that the peers in the same or adjacent fields who have expressed their judgment are indeed at the leading edge of their fields, that appropriate evidence and analysis have been presented of accomplishment and impact on the field to support these judgments, and that the dean has applied the highest, University-wide standard of quality." *See id.* at 13.

After making these assessments, the PRC forwards a written recommendation to the President, defendant Lawrence, who in turn evaluates the evidence and materials accumulated during the process and makes his own recommendation to the Board of Governors. After considering all available information, the Board makes the final tenure determination. *See id.*

III. The Consideration of Harel for Tenure

A. Harel's 1990-91 Evaluation for Tenure

The University first reviewed Harel's candidacy for tenure in the 1990-91 academic year. The seven department faculty members who evaluated his promotion packet voted unanimously to recommend tenure. Four ranked his scholarship as "outstanding," one rated it as "between outstanding and above average," and two found it to be "above average." Jimmy M. Santos Certif. ("Santos Certif."), Exh. 11. The A & P Committee and the Dean also favored tenure. The PRC, however, did not recommend that Harel be promoted to the rank of associate professor with tenure because it found "insufficient evidence of peer recognition for sustained, original scholarly contributions of importance to the development of the discipline to justify promotion and award of tenure at this time." *See* Peirano Certif., Exh. H. He was ultimately denied tenure. Harel did not grieve this decision nor did he allege at that time that the adverse result was because of any type of discrimination.

B. Harel's 1992-93 Evaluation for Tenure

Plaintiff was next considered for tenure in the 1992-93 academic year. By then, Harel had published seven refereed journal articles (three of which he co-authored) and one refereed letter to the editor, had one journal article at press, and had four works in progress (one of which he co-authored). *See* Peirano Certif., Exh. J. Plaintiff's scholarship

focuses on his field of expertise, queueing theory. His promotion packet included fourteen letters from external evaluators who had assessed Harel's work relative to this and his previous tenure application. In the main, these letters were laudatory. Ten of these evaluators explicitly supported the promotion. *See id.*, Exh. DD. None of the evaluators recommended against tenure. *See id.* One of the 1990 external evaluators remarked that Harel was "at the top of his peer group[.]" *Id.* But another expressed doubts concerning the creativity of his work: "While Dr. Harel's work represents quality, it is perhaps less outstanding in terms of creativity." *Id.* Among the distinguished scholars who submitted letters of evaluation in 1992, one referred to the plaintiff as "the number 1 expert in the study of convexity in queuing systems" while another ranked him "in the top twenty percent of Assistant Professors coming up for promotion to Associate Professor at research oriented Universities[.]" *Id.* Evaluators, though, generally praised his earlier work on convexity in queues more than his more recent work on polling and random walks. *See id.* Some of the reviewers suggested that his scholarship lacked "elegance." One noted that his results are sometimes derived from "a lot of seemingly burdensome mathematics[.]" *See* Santos Certif., Exh. 15. Some of the evaluators expressed concern with Harel's relatively small number of publications; one noted that he "does not have a very long publication record." *See* Peirano Certif.Exh. DD. However, most agreed that his works had appeared in top journals.

Dr. Nabil Adam, who had been elected to chair the department that year, appointed Dr. Michael Katehakis and Dr. Ted Szatrowski to serve as plaintiff's reading committee. These individuals previously had served on Harel's reading committee for his first evaluation in 1990-91. Harel contends that they were not qualified to serve on the committee and that their report negatively influenced his candidacy. *See* Santos Certif., Exh. 1 (Pl.'s Aff.) ¶¶ 146, 153. Seven department members, including Dr. Adam, voted in favor of tenure, one voted against it, and one abstained. In its positive

report, the department gave Harel's scholarship an overall rating of "average to above average[.]" *See* Peirano Certif., Exh. K.

The A & P Committee voted unanimously to recommend Harel for tenure. The Dean, Dr. George Francis, also supported his candidacy and commented in his written recommendation that Harel's "number of publications is not great, but most of them appear in the most prestigious journals in the field." *Id.*, Exh. L. The Dean forwarded Harel's promotion packet to the PRC. Seneca, writing for the PRC to Lawrence, recommended against tenure:

> Professor Harel's record since being appointed an Assistant Professor indicates only a moderate publication level and there is some concern about the long term significance and impact of his work. The Committee, therefore, concludes that, based on the assessment of his record, Professor Harel has not achieved a level of sustained, scholarly accomplishment to justify promotion to the rank of Associate Professor with tenure.

Id., Exh. M. President Lawrence concurred with the PRC's evaluation. Plaintiff was informed on April 6, 1993 that he had again been denied promotion. All of the evaluators involved in plaintiff's tenure consideration process in 1992-93 were males save two.

C. Harel's 1993 Grievance

Rutgers has a collectively negotiated agreement with the Rutgers Council of the American Association of University Professors ("AAUP Agreement") that provides for a grievance procedure "to help ensure the integrity of the reappointment, promotion, and tenure procedures; to provide a process for determining whether evaluations resulting in negative personnel actions were flawed . . . and to provide remedies in cases where defects are found." Ambrose Aff., Exh. B (AAUP Agreement). The grievance procedure

permits a faculty member to contest an adverse decision on the grounds that it was the product of procedural violations, discrimination, or enmity; that a recommendation against promotion/tenure was materially inconsistent with the facts in the promotion packet; or that it was arbitrary and capricious when viewed in light of the criteria for granting promotions. If the Grievance Committee finds merit in the allegations, its sole and exclusive remedy is to order a remand. *See id.*

On August 18, 1993, Harel filed a grievance to protest the decision to deny him tenure. He made numerous complaints about his 1992-93 tenure evaluation including allegations that members of the reading committee, his department, and the PRC had acted in an arbitrary and capricious manner by not providing a rigorous and fair review of his work; that the reading committee and department reports contained material factual errors; that the department had committed material procedural violations through its failure to circulate to the reviewing bodies favorable materials submitted by Harel and its non- adherence to the established practice related to external reference letters; and that the members of the reading committee and Dr. Adam had exhibited enmity towards him. *See* Peirano Certif., Exh. D (1993 Grievance). Harel did not charge that his denial of tenure was motivated by discrimination based on either his national origin or gender.

After extensive hearings, plaintiff and the University entered into a "Remand Agreement" that required that Harel's application for promotion be returned to his department for another evaluation. In exchange, Harel agreed to withdraw all of the allegations in his grievance except those that Dr. Adam, Dr. Katehakis, and Dr. Szatrowski had demonstrated enmity in their evaluation of his candidacy. He agreed that he would not bring any future claims based on the withdrawn allegations in any future grievance or before any other forum. The Remand Agreement provided that the decision on remand would be based on the materials submitted in the 1992-93 promotion packet, a letter

submitted by Harel to update the status of the listed works in progress, and a personal statement. Dr. Szatrowski would not participate in the remanded evaluation. *See id.*, Exh. N (Remand Agreement).

On June 26, 1994, the Grievance Committee issued its findings with regard to Harel's claims of enmity. The Committee concluded that Dr. Adam had not acted with enmity. Although the Committee found that Dr. Katehakis' actions were not motivated by enmity, it did find that he "negatively prejudged Harel's capabilities" and acted in an "inappropriate" manner. Peirano Certif., Exh. O at 6-7. With regard to Dr. Szatrowski, the Committee concluded that he had demonstrated enmity toward Harel through his conduct during the evaluation. The Committee unanimously agreed that Dr. Szatrowski had "guided the preparation and presentation of the Reading Committee report in a way that was calculated to produce a negative result." *Id.* at 9. The Committee found that such enmity was the only explanation for Dr. Szatrowski's decision to edit the 1990 report to eliminate positive references and for his various misrepresentations concerning the significance of Harel's work. *See id.*

D. Harel's 1994-95 Evaluation for Tenure

The University gave Harel a remanded evaluation during the 1994-95 academic year. In accordance with the Remand Agreement, Harel submitted an update of the scholarship section of his original promotion packet, which included two additional published articles co-authored by him, one of which had been previously listed as a work in progress. *See id.*, Exh. P. His 1994-95 promotion packet also included the grievance findings, a copy of the Remand Agreement, and the materials considered in connection with his 1992-93 candidacy.

Dr. Hannoch Levy and Dr. Ronald Armstrong were appointed to serve on plaintiff's reading committee. Dr. Levy is Israeli and Dr. Armstrong is American. The reading committee concluded that the type and number of citations to Harel's work was "impressive" and "consistent with the best new researchers in the field." His impact on the field was described as "very significant." Santos Certif., Exh. 15.

According to Dr. Armstrong and Dr. Douglas Jones, another faculty member who participated in the 1994-95 review, Dr. Adam conducted the departmental vote by secret ballot, even though such votes on personnel matters were usually conducted in an open manner. *See* Santos Certif., Exhs. 2 and 3. Four faculty members voted to recommend him for tenure, three voted against it, and one abstained. Dr. Julius Surkis, a Jewish member of the department, was in favor of Harel's promotion in 1990-91 and 1992-93 but has testified that he did not vote for him in 1994 because of "a decline in productivity in his work[.]" *Id.*, Exh. Y (Dr. Surkis' Dep.) at 16. Dr. Adam has explained that he voted against Harel because he no longer saw the "strong potential" in Harel's scholarship that he had observed in 1990. *Id.*, Exh. X. Because less than two-thirds of the department members favored Harel's promotion, the department issued a report that recommended against granting him tenure. The report failed to specifically articulate the views of those who had voted against tenure as required by the Academic Reappointment/Promotion Instructions. *See id.*, Exh. C. The University contends that explanations of the negative votes were omitted because the faculty members who opposed Harel wished to avoid any potential future "confrontation" with him. *See* Santos, Exh. 58.

The A & P Committee voted unanimously to recommend Harel for elevation and evaluated his scholarship as "outstanding." *Id.*, Exh. DD. The dean, who at that time was P. George Benson, also supported Harel's candidacy and wrote that Harel had published in "leading journals" in the field and "very few faculty ever achieve this record of publication in these journals by the time they are reviewed

for tenure." *Id.*, Exh. R. Although the dean noted that other candidates may produce a higher number of publications, he concluded that Harel's "scholarly record [was] deserving of tenure and promotion." *Id.*

In a March 23, 1995 memorandum, the PRC, per Vice President Seneca, again did not recommend tenure to Harel:

> In the area of scholarship, however, Professor Harel's record over this period does not demonstrate sufficiently substantial productivity and, although his contributions are respected by external peers, it is not apparent from the record that his work has had a significant national impact on developments in the field. The Committee, therefore, concludes that, based on the assessment of the record, Professor Harel has not achieved a level of scholarly accomplishment to justify promotion to the rank of Associate Professor with tenure.

Id., Exh. S. President Lawrence also declined to support plaintiff's candidacy. The University notified Harel that he had again been refused tenure on April 14, 1995. Of those persons who evaluated Harel's candidacy in 1994-95, the overwhelming majority were males; the only two females had been members of the PRC.

E. Harel's 1995 Grievance

On May 19, 1995, plaintiff filed a grievance to contest the results of the remanded evaluation. Plaintiff charged that the PRC had evaluated the materials submitted in support of his candidacy in an arbitrary and capricious manner. *See id.*, Exh. E. Harel contended that the PRC's conclusion that his scholarship lacked sufficient productivity and significant impact contradicted the findings reached at other levels of the evaluation process. *See id.* He cited the reading committee's observation that the impact of his results "is well felt" and Dean Benson's finding that his papers were widely cited "indicating that Professor Harel's work has had a significant

impact on the field." Plaintiff also alleged that certain members of his department had acted in an arbitrary and capricious manner by changing from a positive vote in 1992-93 to a negative vote in 1994-95 without explanation despite the more favorable reading committee report. In addition, he accused the University of not taking proper steps to locate two "missing" letters of Professors Richard Weber and Richard Larson in support of his 1990-91 candidacy. In his letter, Professor Larson had referred to Harel as "'the expert' in his field." Santos Certif., Exh. 55. Lastly, Harel charged that Dr. Adam had omitted from his promotion packet on remand a positive internal letter from Professor Benjamin Avi-Itzak and had instead placed it in supplementary materials not available to the PRC for review. *See* Peirano Certif., Exh. E. This letter had praised Harel's scholarship and noted that his "publications on convexity results in queueing processes . . . are of high quality and of great interest to an important group in the queueing theory community. . . ." *Id.* Harel did not specifically assert in this second grievance that national origin or gender discriminatory animus motivated the adverse decision.

As provided for in the AAUP Agreement, the Faculty Appeals Board ("FAB"), a body consisting of appointed faculty members, is responsible for hearing grievances from remanded evaluations. *See* Ambrose Aff., Exh. B. If the FAB finds that there was error in the remanded evaluation, it may either order another remanded evaluation or recommend to the President that the candidate receive tenure. *See id.*

The FAB published its findings on June 22, 1995. It rejected plaintiff's allegations that the PRC members had acted in an arbitrary and capricious manner in the review of his materials. Although it found that "[t]he reasons for the gradual erosion of departmental support are not explained[,]" it did not conclude that the department members had acted arbitrarily or capriciously. *Id.*, Exh. T. The FAB, however, did find that the University was "remiss" in only obtaining Professor Larson's letter in time to include it in the remand packet and never locating Professor Weber's letter of

evaluation. *Id.* The FAB noted that the University had apparently only inquired about the existence of Professor Weber's letter in April 1995. It also found that Professor Avi-Itzak's letter had been "placed in the supplementary material packet which was not readily accessible to the PRC" during its remand evaluation. *Id.* The FAB report stated:

> The Faculty Appeals Board feels that this candidate deserves promotion to Associate Professor with tenure. There are many disturbing facts in this case. Letters from outside reviewers have not been handled with requisite care. Timely receipt of outside letters from professors Larson and Weber, for example, might have convinced the PRC in 1990-91 to recommend promotion. This case includes documented cases of enmity, disqualification of certain individuals from the reading and the promotion process and the failure of the department to explain the erosion of its support for Professor Harel, especially in light of an outstanding reading report documenting his scholarship during the remand process. Unsubstantiated rumors with regard to professor Harel's access to confidential outside letters may have adversely influenced the 1994-95 remand vote.

Id.

Pursuant to the AAUP Agreement, plaintiff's case for tenure was submitted to President Lawrence with the FAB's recommendation. In a letter dated July 26, 1995, President Lawrence informed the plaintiff that, after reconsideration of plaintiff's promotion packet, he still believed "that the record of accomplishments presented is not sufficient to support a different conclusion." *Id.*, Exh. U. Consequently, plaintiff's request for tenure was denied once again. In 1996, Professor Lei Lei, a female member of plaintiff's department, applied for and received tenure.

F. Harel's EEOC Charge of Discrimination

On September 13, 1995, Harel filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that he was denied tenure in 1994-95 on account of his national origin and gender. In the charge, plaintiff contends that the University applied harsher standards of review to male and Israeli tenure candidates in the Graduate School of Management.

IV. The Present Action

On October 6, 1995, plaintiff filed this action alleging that his denial of tenure during the 1992-93 and 1994-95 academic years violated 42 U.S.C. § 1983 by denying him equal protection of law and substantive due process as guaranteed by the Fourteenth Amendment. Plaintiff alleges that defendants Seneca and Lawrence did not support his tenure candidacy because of his Israeli national origin and that their decisions carried forward the discrimination which had occurred throughout his evaluation process. Harel contends that defendants deviated from normal procedures and employed more rigorous standards to him than were applied to non-Israeli candidates. The Complaint specifically alleges that Dr. Adam deviated from standard University evaluation procedures and attempted to sabotage his candidacy when he: (1) requested that a professor who had collaborated with Harel on an article understate plaintiff's contribution to that article; (2) failed to obtain an external recommendation letter from Dr. Nachum Finger, an Israeli scholar; (3) failed to allow plaintiff to review the list of external evaluators the department intended to contact in violation of standard departmental practice; and (4) selected unqualified individuals to serve on plaintiff's reading committee. In an affidavit submitted in opposition to the present motion, Harel also claims that Dr. Adam strayed from established procedure by, among other things, sending out a solicitation letter to external evaluators which differed in form from the normal solicitation letter used and by

conducting the 1994-95 vote by secret ballot. *See* Harel Aff. ¶¶ 154-167, 262. In his original Complaint, plaintiff only alleges national origin discrimination — not gender discrimination — and only asserts a § 1983 cause of action. Plaintiff's substantive due process claim is premised on the purportedly arbitrary and capricious manner in which he was evaluated and the numerous deviations from standard procedures.

After receiving his Notice of Right to Sue letter, plaintiff filed an "Amended Complaint" on August 19, 1996 that added a Title VII gender discrimination claim. Plaintiff maintains that during the early 1990s, the University pressured the Graduate School of Management to grant tenure to more females in order to resolve the underutilization of female faculty members. Plaintiff has submitted a letter dated January 27, 1992 from President Lawrence to the Graduate School of Management indicating his concern with an "underutilization" of female faculty within the school. Santos Certif., Exh. 67. Harel also points to an "Affirmative Action Resolution" issued by the Graduate School of Management on May 15, 1992 which expressed the school's intention "to rededicate itself to the value of diversity among its faculty and to its full and vigorous pursuit in their recruiting, hiring and evaluation." *Id.* According to Harel, this affirmative action policy contributed to the decision to promote less qualified females instead of him. All defendants deny that plaintiff's gender played any role in the decision. Dr. Schnayer, the University's representative in plaintiff's two grievances, has specifically denied that affirmative action affects decisions to promote assistant professors to the position of associate professor with tenure. *See id.*, Exh. 71 (Schnayer Dep.) at 8-9.

Legal Standard for Summary Judgment

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue of material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *See Celotex v. Catrett*, 477 U.S. 317, 318 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *See Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.1976), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party.

Analysis

I. TITLE VII CLAIM OF GENDER DISCRIMINATION

A. Whether the Gender Discrimination Claim Is Timely

Defendants contend that plaintiff filed his "Amended Complaint," which adds a Title VII claim of reverse gender discrimination, in an untimely manner in violation of Title VII's limitations period and the Pretrial Scheduling Order. Defendants seek dismissal of the gender discrimination claim on this ground.

Plaintiff filed his Charge of Discrimination with the EEOC on September 13, 1995, claiming that he had been denied tenure on account of his Israeli national origin and gender. He then filed the original Complaint in this action on October 6, 1995, alleging that he had been discriminated against based on his national origin in violation of § 1983. This Court issued a Pretrial Scheduling Order that provided that "[a]ny motion to amend pleadings must be returnable not later than **May 13, 1996**." (emphasis in original). The EEOC did not issue plaintiff his Notice of Right to Sue letter until May 21, 1996, eight days after the deadline to amend pleadings. On August 19, 1996, Harel, without seeking leave of this Court, filed the "Amended Complaint." Defendants argue that this "Amended Complaint" was not properly filed within the Title VII limitations period or within the deadline set by this Court.

Title VII plaintiffs must file their Complaint not more than 90 days after they receive statutory notice of their right to sue. *See* 42 U.S.C. § 2000e-5(f)(1). Defendants contend that the mere filing of the "Amended Complaint" on August 19, 1996 does not constitute the bringing of a Title VII claim within this limitations period. In *Pygatt v. Painters' Local No. 277*, 763 F. Supp. 1301, 1310-11 (D.N.J. 1991), the court

found that where a plaintiff had a pending complaint in district court at the time that he received notice of his right to sue, "filing a motion for leave to amend a complaint constitutes the bringing of a Title VII claim within the statutory ninety-day period." *See also Pollard v. City of Hartford*, 539 F. Supp. 1156, 1160-61 (D. Conn. 1982). The problem here is that plaintiff never formally sought or received leave to amend his Complaint as required by Fed. R. Civ. P. 15(a). He simply filed the "Amended Complaint" within the ninety-day limitations period, without leave to do so.

The Court excuses plaintiff's procedural error. Defendants failed to object to the "Amended Complaint" when it was filed. Over a year later, defendants now raise the timeliness challenge. Consistent with principles of equity, the Court finds that the defendants have waived their right to object to plaintiff's failure to seek leave and have impliedly consented to the amendment by conducting discovery in connection to the gender discrimination claim over the past several months.

Moreover, had plaintiff requested leave to amend when he added the Title VII claim, the request would have undoubtedly been granted. Leave to amend a complaint should be granted freely in the absence of undue delay or bad faith on the part of the movant so long as the amendment would not be futile and the opposing party would not suffer undue prejudice. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985). "[P]rejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978). Defendants have made no showing of prejudice. Because Harel filed the "Amended Complaint" relatively early in the proceeding, defendants have had ample opportunity to conduct discovery on the claim of gender discrimination and prepare for trial. And because the EEOC charge was pending at the time this suit was initially filed in 1995, defendants had

notice that plaintiff might eventually bring a Title VII gender discrimination claim in addition to the § 1983 cause of action. The Title VII claim is not futile and not made in bad faith or with undue delay. Under these circumstances, the Court will not deny plaintiff the opportunity to have his gender discrimination claim decided on its merits despite his failure to comply with the procedural requirements to amend pleadings.

The Court also excuses plaintiff's noncompliance with the deadline set in the Pretrial Scheduling Order. The EEOC did not issue its Notice of Right to Sue letter until May 21, 1996, eight days after the Order's deadline for amending the pleadings. Consequently, it was impossible for the plaintiff to comply with this deadline as well as the administrative requirements of Title VII. The Court notes that in this situation, plaintiff should have moved to amend the Pretrial Scheduling Order to extend the deadline on account of the pending EEOC charge. *See* Fed. R. Civ. P. 16(b) (Pretrial Scheduling Orders may be modified "upon a showing of good cause). However, the Court will not preclude the gender discrimination claim based solely on counsel's procedural 'legal blunder' absent a showing of bad faith or undue prejudice."

B. Whether Harel's Title VII Claim Regarding His 1992-93 Denial of Tenure Is Barred by His Failure to Exhaust Administrative Remedies

Defendants contend that any claim of discrimination based on Harel's denial of tenure in the 1992-93 academic year is barred because Harel failed to bring an EEOC complaint about this initial adverse decision within the prescribed period. According to them, any alleged discriminatory conduct that occurred more than 180 days before Harel filed his EEOC charge is not actionable.

Title VII requires a claimant to file an EEOC charge within 180 days of the allegedly discriminatory practice. *See* 42 U.S.C. § 2000e-5(e). Here, Harel received notice that he had been denied promotion as a result of the 1992-93 evaluation process on April 6, 1993. This began the limitations period. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (filing limitations period begins upon communication of the tenure decision). The pendency of a grievance, or any other method to collaterally review an adverse employment action, does not toll the limitations period. *See id.* at 261. Harel did not file any charge with the EEOC until September 13, 1995, almost two years after his 180-day limitations period had expired.

While Harel does not dispute these dates, he argues that his claim of discrimination during the 1992-93 evaluation survives on the basis of the "continuing violation doctrine." The Third Circuit has acknowledged "that the filing of a timely charge is 'a requirement that, like a statute of limitation, is subject to waiver, estoppel, and equitable tolling.'" *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754 (3d Cir.1995) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). One of the judicially created equitable exceptions to the timeliness requirement is the continuing violation theory. Under this theory, "the plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination by the defendant." *Id.* To establish a continuing violation, a plaintiff must show that: (1) at least one allegedly discriminatory act occurred within the filing period and (2) the discrimination is "more than the occurrence of isolated or sporadic acts of intentional discrimination" and is instead a continuing pattern of discrimination. *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 481 (3d Cir. 1997). If the plaintiff satisfies these criteria, he may recoverfor damages incurred as a result of the entire continuing violation, and the 180- day limitations period presents no obstacle. *See id.* It is undisputed that plaintiff has met the first element by alleging

that his rejection in July 1995 constitutes unlawful discrimination. Whether he satisfies the second element is more complex.

The Third Circuit has adopted the three factors enumerated by the Fifth Circuit in *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971 (5th Cir. 1983), to determine if a series of acts form an ongoing pattern of discrimination:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring . . . or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most significance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Rush, 113 F.3d at 482 (quoting *Berry*, 715 F.2d at 981).

Courts generally view two distinct decisions against promotion as discrete acts instead of an ongoing practice or policy of discrimination. *See Clark v. Commonwealth of Pennsylvania*, 885 F. Supp. 694, 703 (E.D. Pa. 1995) (adverse promotional decisions made within two years on the basis of a civil service exam "were separate and distinct instances of promotions and cannot be grouped together as a continuing violation"); *Johnson v. Frank*, 828 F. Supp. 1143, 1150 (S.D.N.Y.1993) ("Serial decisions not to promote do not themselves give rise to a continuing violation."). Plaintiff contends that the two tenure decisions constitute a continuing violation because the same discriminatory policy and practice permeated each review. He points out that, for the most part,

the reviewing bodies consisted of the same people in 1992-93 and 1994-95 and that the latter decision was merely an extension of the earlier denial because it was a remand from the previous decision.

In *Stewart v. Rutgers*, 930 F. Supp. 1034 (D.N.J. 1996) ("*Stewart I*"), another court of this district addressed this issue under remarkably similar circumstances. There, the plaintiff, Stewart, alleged that Rutgers, Seneca, and Lawrence had denied her tenure on account of her race. Like Harel, she had been evaluated and denied tenure in 1992-93 based on the negative recommendation of the PRC and Lawrence. She filed a grievance and the Grievance Committee directed that a remanded evaluation occur during the 1994-95 academic year. The University again denied her tenure. In determining whether the 1993 adverse decision was time-barred, the court concluded that the adverse decisions by the PRC and Lawrence in 1993 and 1995 were "isolated incidents" and could not be considered a continuing violation. Id. at 1048.[4] Although the Third Circuit reversed the decision in *Stewart I* on a different ground to be explained *infra*, the court of appeals agreed with the distinct court's finding that the two tenure denials did not represent a continuing violation. *See Stewart v. Rutgers*, 120 F.3d 426, 433 (3d Cir.1997) ("*Stewart II*") ("the district court was correct in finding that any discrimination claim based on Stewart's 1992-93 tenure denial is time-barred").

The Court concurs with the above rationale of *Stewart I* and holds that the continuing violation theory is inapplicable to these circumstances. Although the acts were of the same nature — denial of tenure with allegations of gender and nationality discrimination — the other two *Berry* factors

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[4] Stewart brought her discrimination claim pursuant to § 1983, not Title VII. The court applied the "continuing violation theory" to determine whether it should employ an equitable exception to the two-year limitations period for § 1983 actions. However, the same analysis applies to determine if claims are barred by noncompliance with Title VII's filing deadline.

weigh against Harel. With regard to frequency, the plaintiff alleges two discriminatory acts during his nine year employment at the University — the two decisions not to grant him tenure. The Court views these acts as isolated employment decisions as opposed to a recurring pattern of discrimination. Importantly, the initial decision to deny him tenure in 1993 was sufficiently permanent to trigger his awareness of a need to assert his rights at that time. The Third Circuit has noted that a discrete event, such as a denial of a promotion, is more likely to trigger a plaintiff's duty to assert his rights than an ongoing practice such as continued harassment which involves various incidents throughout a lengthy period of time. *See West*, 45 F.3d at 756. Plaintiff received unequivocal notice of his tenure denial in April 1993; he was obligated to filed an EEOC charge within 180 days of this date. His grievance and the eventual decision to remand for another evaluation does not affect the permanence of this initial decision nor does it toll the running of the 180-day period. *See Ricks*, 449 U.S. at 258.

It follows then that Harel's claim of gender discrimination in connection with his 1992-93 tenure denial is barred because he failed to bring this claim before the EEOC in a timely manner as required by Title VII.[5]

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[5] The Court also notes that Harel failed to exhaust all administrative prerequisites with regard to his claims relating to the 1992-93 decision because he never brought them before the EEOC. The EEOC charge refers only to the events surrounding the 1995 decision and explicitly states that the earliest date on which the alleged discrimination occurred was on July 26, 1995. *See* Peirano Certif., Exh. F. Plaintiff also did not check the appropriate box on the form to indicate that he was complaining of a continuing violation. *See id.* A plaintiff must first present his claim to the EEOC before commencing a Title VII action. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976). Harel's failure to first present his claim of discrimination with regard to the 1992-93 evaluation to the EEOC therefore precludes him from bringing any claim stemming from this initial rejection. *See Metsopulos v. Runyon*, 918 F. Supp. 851, 858 (D.N.J. 1996).

C. Whether Harel May Assert Title VII Claims Against Defendants Seneca and Lawrence

Seneca and Lawrence argue that they cannot be held liable under Title VII because they are individuals and not employers. Title VII prohibits "an employer" from engaging in discrimination. 42 U.S.C. § 2000e-2(a). The statute defines "employer" as "a person in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(a). Plaintiff maintains that Seneca and Lawrence are "agents" covered by the statute and thus can be held individually liable. Plaintiff ignores the reality that the Third Circuit has recently directly addressed this issue. In *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 2532, (1997), the Third Circuit explicitly adopted the approach of the majority of circuits and concluded that individual employees cannot be held liable under Title VII. This decision is obvious, binding precedent: the Court dismisses the Title VII claims against Seneca and Lawrence.

D. Whether Plaintiff Can Establish A *Prima Facie* Case of Gender Discrimination With Regard to His 1994-95 Denial of Tenure

Because of the foregoing rulings, all that remains of plaintiff's Title VII claim is his contention that Rutgers discriminated against him during his consideration for tenure in 1994-95 because he is a male. Plaintiff relies on indirect evidence to establish his case. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the United States Supreme Court established a framework for analyzing claims of discrimination in which the plaintiff seeks to prove his case through circumstantial evidence. Under the *McDonnell/Burdine* burden-shifting framework, the plaintiff must first make out a *prima facie* case, which raises a rebuttable inference of discrimination. *See Burdine*, 450 U.S. at 252-54. Summary judgment will be granted if

plaintiff fails to establish a *prima facie* case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. If the plaintiff makes this initial showing, the burden shifts to the employer to "articulate some legitimate, non-discriminatory reason for [plaintiff's] treatment." *Burdine*, 450 U.S. at 253. Once the defendant offers such an explanation, the plaintiff must produce evidence to show that the reasons proffered by the defendant were pretextual and "merely a fabricated justification for discriminatory conduct." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987). At all times, the burden of persuasion remains on the plaintiff to prove intentional discrimination. *See Burdine*, 450 U.S. at 253.

In the ordinary gender discrimination case brought for failure to promote, to establish a *prima facie* case, the plaintiff must establish by a preponderance of the evidence that (1) she is a member of a protected class; (2) has applied for, and was qualified for the position but was rejected despite these qualifications; and (3) similarly situated nonmembers of the protected class were treated more favorably. *See Roebuck v. Drexel Univ.*, 852 F.2d 715, 726 (3d Cir. 1988). However, this is not the typical gender discrimination case because plaintiff is a male and alleges reverse discrimination. While the Supreme Court has held that Title VII protects all groups from discrimination, not just traditionally disfavored groups, *see McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976), the significant question is whether the elements of the *prima facie* showing should be adjusted in reverse discrimination cases.

Although the Third Circuit has yet to address this issue, other circuits have modified the first prong of the *prima facie* case to require a plaintiff to show additional "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *see also Duffy v. Wolle*, 123

F.3d 1026, 1037 (8th Cir. 1997); *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986); *Murray v. Thistledown Racing Club*, 770 F.2d 63, 67 (6th Cir. 1985). District courts in this circuit have also adopted this formulation. *See, e.g., Davis v. Sheraton Society Hill Hotel*, 907 F. Supp. 896 (E.D. Pa. 1995); *Daly v. Unicare Corp. — Township Manor Nursing Center*, No. 94-6838, 1995 WL 251385 (E.D. Pa. Apr. 26, 1995); *Sanitate v. Securiguard, Inc.*, No. 91-4758, 1992 WL 366914 (D.N.J. Sept. 30, 1992). This requirement substitutes for plaintiff's burden to show that he is a member of a protected class.

Courts have reasoned that to require this elevated *prima facie* showing is consistent with the historical purpose of Title VII and the rationale behind the burden-shifting framework. Congress' primary objective when it enacted Title VII was "to assure equality of employment opportunities" to those who have been traditionally discriminated against in our society. *See McDonnell Douglas*, 411 U.S. at 800. Under the burden shifting framework, an "inference of discrimination" arises when an employer fails to promote a qualified member of a protected class. As the Supreme Court has articulated, "we presume these acts, otherwise unexplained, are more likely than not based on consideration of impermissible factors." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). No such inference, however, arises when the employee is a man or a member of a majority group. *See Harding v. Gray*, 9 F.3d at 153. Because invidious discrimination against males is rare in our society, "there is nothing inherently suspicious in an employer's decision to promote a qualified [female] applicant instead of a qualified [male] applicant." *Id.* Thus, in order to create a rebuttable inference of discrimination, males, and members of other traditionally favored groups, are required to produce additional particularized evidence, other than their status, to suggest that their employer would be inclined to discriminate against their group. The *McDonnell Douglas* court cautioned that the elements of the *prima facie*

showing are "flexible" and to be adjusted to the circumstances of each case. *See McDonnell Douglas*, 411 U.S. at 802 n. 13.

The Court finds the rationale of this heightened standard persuasive, and holds that to establish his *prima facie* case, Harel must present background circumstances supporting the suspicion that Rutgers is that unusual employer that discriminates against males when granting tenure.[6] Both parties agree in their briefs that this is the proper standard to apply. *See* Pl.'s Br. at 16; Def.'s Br. at 9. The Court recognizes that to require this additional proof may impose a difficult burden on reverse discrimination plaintiffs. However, it is not too unfairly burdensome to require plaintiffs after discovery to make an affirmative, concrete showing of circumstances that indicate that their employer tends to discriminate against members of their group. Although the pervasiveness of discrimination within our society may have decreased since the enactment of Title VII, the unfortunate reality is that discrimination against females and minorities is still sufficiently common to allow different *prima facie* evidentiary burdens for minority and majority plaintiffs. Regardless, the Court emphasizes that all plaintiffs, whatever their status, still have the same ultimate burden of

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[6] The Tenth Circuit in *Notari v. Denver Water Dep't*, 971 F.2d 585 (10th Cir. 1992), found that plaintiffs in reverse discrimination cases have an additional alternative that they may pursue if they cannot meet the "background circumstances" test. The *Notari* court held that a male plaintiff may establish a *prima facie* case of disparate treatment by "indirect evidence sufficient to support a reasonable probability, that but for plaintiff's status, the challenged employment decision would have favored the plaintiff." *Id.* at 590. A plaintiff who pursues this alternative method of proof may not rely on the presumption that is implicit in the *McDonnell Douglas/Burdine* framework. This Court does not adopt this alternative because it finds that it is subsumed by the "background circumstances" test. Any evidence that would establish a reasonable probability that plaintiff would have been promoted but for his gender would also constitute "background circumstances" sufficient to establish an inference of discrimination and shift the burden to the employer to offer a legitimate, non-discriminatory reason for its decision.

proof — that is, the burden to establish by a preponderance of the believable evidence that they were discriminated against because of their status.

The *Harding* court divided the types of "background circumstances" which might support an inference of discrimination into two categories: "(1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against [males]" and "(2) evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Harding*, 9 F.3d at 153. In other words, Harel may establish a *prima facie* case of reverse discrimination if he can establish either that Rutgers has a tendency to discriminate against men or that the circumstances surrounding his denial of tenure in 1995 are sufficiently suspicious to warrant the conclusion that he was discriminated against based on his gender. Some of the factors courts have examined when analyzing whether a male or nonminority plaintiff has satisfied the "background circumstances" prong of the *prima facie* standard include the percentage of minority employees elevated to plaintiff's desired position, *see Davis v. Sheraton Society Hill Hotel*, 907 F. Supp. 896, 902 (E.D. Pa. 1995); *Murray*, 770 F.2d at 68, the proportion of the decision makers who were minorities, *see Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523, 1535 (10th Cir. 1995); *Davis*, 907 F. Supp. at 902, the qualifications of the minorities who received the position instead of the plaintiff, *see Duffy*, 123 F.3d at 1037; *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986), evidence of other irregular acts of favoritism towards minority employees, *see Machakos v. Meese*, 647 F. Supp. 1253, 1262 (D.D.C.1986), and internal and external pressures to increase diversity, *see Bishopp*, 788 F.2d at 787; *Lamphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983).

Harel argues that the internal pressure that was placed on the Graduate School of Management in the early 1990s to correct its "underutilization" of female faculty along with the

promotion of allegedly less qualified, female Professors Lei Lei and Rosa Oppenheim are sufficient to establish that Rutgers is the unusual employer that would discriminate against males. The Court disagrees. Viewing all evidence in the light most favorable to the plaintiff, the Court assumes that Rutgers had instituted a policy to encourage the advancement of female faculty members within the Graduate School of Management. However, plaintiff has presented no evidence to indicate or to suggest that any of plaintiff's evaluators relied on this policy when they denied Harel tenure in 1994-95. Plaintiff has failed to establish any nexus between a possible general effort to increase female representation on the Graduate School of Management faculty and the specific decision not to grant him tenure. Moreover, there is no evidence to suggest that such an affirmative action policy played any role in tenure decisions at the University. In 1994-95, 102 of the 134 candidates for tenure were male. Of the forty-five faculty members who received tenure, thirty-five were male, or 69%. *See* Ambrose Aff. ¶ 9. Although the female applicants were proportionately slightly more successful than the male candidates (44% of the female applicants were granted tenure while only 30% of the male applicants were successful), this alone does not demonstrate that gender was a motivating factor in the tenure evaluation process at the University. This is especially so in light of the 1992-93 tenure grants when 57% percent of the male candidates were successful while only 52% of the female applicants were granted tenure. *See id.* These statistics do not reflect a general disposition to discriminate against males.

Plaintiff also contends that the 1996 decision to grant tenure to Professor Lei Lei, a female in plaintiff's department, demonstrates that the University had an inclination to favor females. Harel asserts that Lei Lei was less qualified for promotion and that her scholarship was weaker than his. Wary of the Third Circuit's admonishment not to substitute our "judgment for that of the college with respect to the qualifications of faculty members for

promotion and tenure[,]" *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980), the Court has no desire, and, for that matter, is not competent to determine whether Harel was indeed more qualified to be an associate professor than was Professor Lei Lei.[7] However, the Court notes that when Professor Lei Lei applied for tenure, she listed a significantly greater number of works in progress and at press, although she had written one fewer refereed journal article than had Harel when he was considered in 1994. *See* Santos Certif., Exh. 24. Of course, there is no way for the Court to evaluate the quality or impact of these works or to compare them to Harel's publications. With the record's evidence, no reasonable juror could find that the promotion of one female in 1996 proves that Rutgers was the "unusual employer" that would favor females in its tenure evaluation process. There is no evidence that the University applied its established criteria for granting tenure less rigorously when evaluating Professor Lei Lei than when evaluating the plaintiff.

Professor Oppenheim was the only tenured female in Harel's department during the relevant time period. Harel contends that the University applied less stringent review standards to Professor Oppenheim when it promoted her to be a full professor [8] than were applied to him during his tenure evaluation. That contention is only rhetoric. There is no evidence of the credentials of Professor Oppenheim at the time of her promotion or any evidence to compare her to similarly situated male associate professors who became full professors during this time period. Consequently, it is impossible to infer that she received favorable treatment because of her gender. Additionally, any comparison between Professor Oppenheim and the plaintiff is inapposite

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[7] The Court is not in possession of Professor Lei Lei's full promotion packet because it apparently was not produced by the defendants during discovery. Plaintiff, though, has filed no motion to stay the disposition of this summary judgment motion pending a motion to compel the production of the packet.

[8] Associate professors with tenure may seek promotion to the position of full professor at Rutgers.

and irrelevant because each sought different positions at different times.

Other than Professors Lei Lei and Oppenheim, Harel has failed to name any other allegedly less qualified female professor who was promoted. In addition, other factors used to meet the "background circumstances" prong are not present. Twenty of the twenty-two evaluators who reviewed plaintiff's candidacy in 1994-95 were male, including Seneca, Lawrence, and the department members who voted against Harel. Although males certainly could discriminate against fellow males, a reverse discrimination plaintiff's case is generally stronger when nonmembers of his group made the challenged employment decision. *See Reynolds*, 69 F.3d at 1535. Plaintiff also has produced no evidence of any other irregular acts of favoritism towards female faculty members at Rutgers to suggest a gender bias. Because of the dearth of evidence to indicate that the University favored female professors, the Court finds that no rational juror could find sufficient background circumstances to indicate that Rutgers was the unusual employer that discriminated against males in its tenure evaluation process. Harel has failed to establish a *prima facie* case of reverse gender discrimination and his Title VII claim against the University is therefore dismissed.

II. SECTION 1983 CLAIM OF NATIONAL ORIGIN DISCRIMINATION

A. Whether Harel's National Origin Discrimination Claim Based on His 1992-93 Tenure Denial Is Barred by the Statute of Limitations

Because § 1983 does not contain its own statute of limitations period, courts must apply the forum state's limitations period for personal injury torts; New Jersey's is two years. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir.1991). The limitations period for any § 1983 claim relating to Harel's denial of tenure in 1993 accrued on April 6, 1993, the date he received notice of the adverse decision. He did not file this suit until more than two years later on October 6, 1995. As decided above, plaintiff cannot escape the statute of limitations bar under the theory that his two denials constitute a "continuing violation." *See Stewart I*, 930 F. Supp. at 1048. Consequently, the § 1983 claim arising from the 1992-93 denial of tenure is time-barred and is dismissed.[9]

B. Whether Rutgers Is Entitled to Summary Judgment on the § 1983 Claim

Under § 1983, a government entity, such as Rutgers, cannot be held liable for the actions of its employees on a theory of respondeat superior. *See Monell v. Department of Social Serv.*, 436 U.S. 658, 691 (1978). To subject Rutgers to liability under this section, Harel must demonstrate that the

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[9] Defendants also argue that plaintiff waived his right to bring any claim arising from the 1992-93 tenure denial when he signed the Remand Agreement. The Court will not address this issue because any such claim is barred by the statute of limitations.

alleged discrimination was the direct result of an official anti-Israeli University policy or custom. *See id.* at 694 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edict or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). Such a policy or custom may be established in two ways. First, the actions of an individual policy-maker may constitute an entity's policy. "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). The issue of whether an official has final policy making authority is a question of state law. See *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). A single decision by such a policy-maker may constitute official policy. *See Pembaur*, 475 U.S. at 480-81. Second, "[a] course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." *Andrews*, 895 F.2d at 1480 (quoting *Monell*, 436 U.S. at 690).

Harel has not produced evidence to indicate that his deprivation of tenure was a direct result of either an official University policy or custom. Although he contends that the decisions of Seneca and Lawrence not to recommend him for tenure were based on his Israeli national origin, these decisions do not constitute official policies of the University because these administrators had no final authority to make policy for the University. Under the University's promotion procedures, the decisions of Seneca and Lawrence were mere recommendations. Only the Board of Governors was authorized to make final tenure determinations. The University cannot be held liable under § 1983 for the actions of Seneca or Lawrence, or for that matter, for the actions of any other evaluator, because to do so would be to impose

liability on the prohibited theory of respondeat superior. *See Monell*, 436 U.S. at 691. The only official policies regarding the tenure review process are in the "University Policy with Respect to Academic Appointments and Promotions" and the "Academic Reappointment/Promotion Instructions" which demonstrate no anti-Israeli bias. Plaintiff has presented no evidence to suggest an official policy of anti-Israeli sentiment.

Moreover, Harel has not shown that the University exhibited a custom of discrimination against Israelis in the tenure evaluation process. He argues that the wrongful acts of which he complains pervaded his entire review process and do not constitute merely a single decision, but instead demonstrate a University discriminatory custom. *See* Pl.'s Br. at 21. The Court finds this argument to be an unpersuasive attempt to portray a single allegedly unconstitutional decision as a University-wide practice or custom. All the improprieties that Harel alleges infiltrated his evaluation culminated in a single final determination not to elevate him to the position of associate professor with tenure. A plaintiff must establish discriminatory actions directed at other individuals in order to demonstrate an unconstitutional custom or practice on the part of a governmental body.

In support of his allegation that Rutgers had a custom "of applying more stringent standards to the consideration of Israelis for promotion and tenure than to others[,]" Compl. at ¶ 41, plaintiff has named three Israelis who purportedly suffered such disparate treatment: Abraham Ravid, Moshe Adler, and Ron Armstrong. *See* Peirano Certif, Exh. BB (Answer to Interrogatory # 18). However, plaintiff, admits that each of these individuals has received tenure. Harel refers to the difficulties that each of these professors experienced during the process and the grievances that Ravid and Adler filed before they ultimately were promoted. Harel, though, has offered no evidence to show that these individuals' tenure considerations were infected in any manner by an anti-Israeli bias. This anecdotal evidence is insufficient to establish the widespread and well settled

practice necessary to demonstrate a custom and impose liability upon the University.

Thus, the Court dismisses all § 1983 claims against Rutgers because no reasonable fact finder could conclude that plaintiff's alleged discriminatory treatment was a direct result of an official anti-Israeli University policy or custom.

C. Whether Harel Has Presented Sufficient Evidence in Support of His National Origin Discrimination Claim Based on His 1994-95 Tenure Denial to Defeat Summary Judgment with Regard to the Claims Against Seneca and Lawrence

The remainder of the § 1983 equal protection claim is Harel's assertion that Seneca and Lawrence opposed his tenure bid in 1994-95 on account of his Israeli origin. To establish a § 1983 claim against Seneca and Lawrence for a denial of equal protection, Harel must prove by a preponderance of evidence that these officials purposely discriminated against him based on his national origin. *See Andrews*, 895 F.2d at 1478. Courts apply the same Title VII burden-shifting framework to equal protection claims brought under § 1983. *See Molthan v. Temple Univ.* 778 F.2d 955, 961 (3d Cir. 1985).

In *Roebuck v. Drexel Univ.*, the Third Circuit reviewed the three- step analytical framework for discrimination cases in the tenure context. As mentioned above, first plaintiff must establish a *prima facie* case of discrimination based upon these three requirements: (1) he is a member of a protected class; (2) he applied for, and was qualified for tenure but was rejected despite the qualifications; and (3) similarly situated nonmembers of the protected class were treated more favorably. *See Roebuck*, 852 F.2d at 726. Initially, defendants contest that Harel is a member of a protected class by disputing that his true national original is Israeli as alleged. Defendants employ a technical definition of national origin

and argue that because Harel and his parents were actually born in Czechoslovakia, he should not be considered Israeli.

Defendants overly simplify the definition of one's "national origin" in the context of discrimination. The Equal Employment Opportunity Commission has given national origin discrimination an expansive definition in its regulations:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

29 C.F.R. § 1606.1. Although this definition applies specifically to Title VII violations, recognizing the parallel standards that govern § 1983 national origin discrimination claims, there is no reason that this Court should narrow the definition here. Moreover, the Third Circuit addressed the amorphous concept of national origin and concluded that the emphasis should be on the plaintiff's objective appearance to others, not necessarily on his ancestry or birthplace:

> We think unlawful discrimination must be based on [plaintiff's] objective appearance to others, not his subjective feeling about his own ethnicity. Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits.

Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992). In *Bennun*, the court found that although the plaintiff was born in Argentina, not in Spain, he would still be considered Hispanic for purposes of a Title VII discrimination suit based on his birth in "a Latin American country where Hispanic culture predominates, his immersion in Spanish ways of life and the

fact that he speaks Spanish in [his] home." *Id.* Similarly, Harel's objective appearance likely might lead the reasonable employer to deduce that he was Israeli: he was raised in Israel; he speaks Hebrew, his first language, at home; he speaks English with a discernible accent; he remains an Israeli citizen; and he clearly identifies with his Israeli culture. *See* Harel Aff. ¶¶ 9-12. In light of these characteristics, plaintiff has at least established a genuine issue of material fact concerning whether his objective appearance would suggest that he is Israeli. Consequently, he has satisfied the first prong of his *prima facie* case.

In failure-to-grant tenure cases, the Third Circuit has instructed that "in order to satisfy the qualifications element of the [*prima facie* case], plaintiff need only show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body." *Roebuck*, 852 F.2d at 726 (quoting *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 63 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981)). The favorable votes that plaintiff received from many of his peers in his department during the 1990-91, 1992-93, and 1994-95 evaluations, the positive recommendations given by the A & P Committee and the Dean during these academic years, and the numerous laudatory evaluations that he received from reputable professors in his field indicate that he certainly fell at least within this "middle group" that deserved tenure consideration.

An unsuccessful candidate may satisfy the third and final prong of his *prima facie* case "by showing that tenure positions 'were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure.'" *Id.* (quoting *Banerjee*, 648 F.2d at 62). Harel

clearly meets this standard because the University granted tenure to a non- Israeli member of his department, Professor Lei Lei, during the year after his final denial.

Once Harel establishes his *prima facie* case, the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for the decision. *See McDonnell*, 411 U.S. at 802. The defendants have met this burden by asserting that Harel was denied elevation because the quantity and impact of his scholarship did not meet the University's standards to justify promotion. Seneca indicated this in the PRC memorandum that recommended against tenure. *See* Peirano Certif., Exh. S.

Once the employer offers a non-discriminatory explanation for the action, the plaintiff has the burden to demonstrate that this reason is merely a pretext for discrimination. To defeat a motion for summary judgment, the plaintiff "must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Plaintiff need only present "enough evidence for a jury to find that the asserted reasons for the tenure denial were not the actual reasons, then the jury may infer that the employer actually was motivated in its decision by [national origin]; plaintiff is not required to provide independent, direct evidence of [national origin] discrimination." *Roebuck*, 852 F.2d at 726. However, Harel must establish "more than a denial of promotion as a result of a dispute over qualifications" to show pretext. *Molthan*, 778 F.2d at 962.

In his attempt to cast doubt on the defendant's explanation, Harel points to two circumstances: (1) the substantial departures from the standard review procedures that permeated his evaluation and are outlined in the FAB's report and (2) the granting of tenure to less qualified non-

Israeli candidates with a weaker scholarship record. Harel argues that the procedural irregularities that plagued his evaluation, such as the mishandling of one of his reference letters and the enmity exhibited by Dr. Szatrowski, suggest that discrimination influenced his review. Harel relies in part on *Stewart II*. In *Stewart II*, after concurring with the district court's conclusion that an action based on Stewart's initial denial of tenure in 1993 was barred by the statute of limitations, the court of appeals emphasized that, nevertheless, events surrounding that first decision were still relevant to plaintiff's claim of discrimination based on the second denial. *See Stewart II*, 120 F.3d at 433. The Rutgers Grievance Committee had found that the PRC's recommendation against awarding Stewart tenure in 1993 had been "arbitrary and capricious" and "could not have been reached by reasonable evaluators[.]" *Id.* The Committee had documented "various inconsistencies and procedural errors" within the PRC's report and had ordered a reevaluation of Stewart's tenure bid. *Id.* The Third Circuit held that the Committee's findings alone precluded the district court from granting summary judgment to theUniversity, Seneca, and Lawrence. According to the court, the Committee's report presented "sufficient evidence upon which a jury could conclude that Stewart's 1994-95 tenure denial may have stemmed from discrimination based on race." *Id.* at 434.

Here, however, the irregularities in the evaluation process that the FAB noted in its report, including Dr. Szatrowski's enmity, the mishandling of a reference letter, and the department's failure to adequately explain its altered opinion of Harel's qualifications in its 1994 report, all occurred at the lower levels of the hierarchical evaluation process. Furthermore, any improper methods employed by department chair Dr. Adam cannot be imputed to defendants Seneca and Lawrence, who played no role in these early stages of review. There is no evidence to link Seneca or Lawrence to these alleged deviations from the standard consideration procedures. Although the FAB recommended Harel for tenure and apparently disagreed with the defendants'

assessments of the quality and impact of his scholarship, the FAB did not go so far as to conclude that the decision to reject Harel for tenure was "arbitrary and capricious" as was the case in *Stewart II*. In fact, the FAB explicitly rejected plaintiff's allegation that the PRC members had acted in an arbitrary and capricious manner in reviewing his materials. *See* Peirano Certif., Exh. T. There is no evidence to link either Seneca or Lawrence to the documented improprieties or the alleged improper conduct of Adam. The FAB findings do not suggest that either of these defendants demonstrated any discrimination towards the plaintiff or acted in an "arbitrary and capricious" manner. Therefore, the procedural irregularities that may have infected the lower stages of review do not prevent this Court from granting summary judgment to Seneca and Lawrence in their personal capacities. That the FAB disagreed with the defendants' assessments of Harel's credentials does not satisfy the plaintiff's burden to produce evidence to indicate that the Seneca and Lawrence purposely discriminated against him on account of his Israeli national origin.

The Court is also unpersuaded by Harel's attempt to compare his own research accomplishments to other faculty members who have received tenure. It is not this Court's responsibility to "sit as a super tenure review board[.]" *Roebuck*, 852 F.2d at 731. Evaluating the quality and impact of a professor's publications in an area as complex as queueing theory is an intellectual exercise best left to that professor's peers who can more comprehensively assess the substance of the professor's works. The Third Circuit has acknowledged this and has hesitated to interfere with a university's judgments:

> [I]t is clear that courts must be vigilant not to intrude into that determination [of whether to grant tenure], and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are

> subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluations by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Kunda, 621 F.2d at 548. If plaintiff had claimed that Seneca and Lawrence had applied an objective criterion in an unmistakably disparate manner to other tenure candidates, this Court may have found that such evidence raised a genuine material issue of pretext. *See id.* at 545 (it was not clearly erroneous for trial court to find as pretextual college's proffered explanation that female instructor did not receive promotion because she had not obtained a master's degree when three other male faculty members within plaintiff's department had been promoted notwithstanding their failure to obtain a degree). Instead, the plaintiff questions the defendants' evaluation of the impact of his work, a subjective judgment.

Moreover, Harel has failed to produce evidence to demonstrate that either Seneca or Lawrence clearly applied the University's promotion criteria in an inconsistent manner. This case differs from *Bennun* where the Third Circuit found that it was not clear error for the district court to view as pretextual the University's contention that it had not promoted the plaintiff because of the poor quality and insufficient quantity of his research. *See Bennun*, 941 F.2d at 177-80. Although the court there arrived at that conclusion by a comparison of the plaintiff's research accomplishments to those of another candidate who had received tenure in his department, in that case there was a stark inconsistency--the plaintiff received a lower rating for his research productivity despite the fact that he had published substantially more works than the professor who was given tenure. *See id.* at 179. There is no such obvious inconsistent application of objective criteria here. The only non- Israeli member of plaintiff's department who received tenure during the relevant time period, Dr. Lei Lei, had produced one fewer

refereed article but had significantly more works in progress at the time of her tenure bid. *See* Santos Certif., Exh. 24. This is far from the plain disparity that existed in *Bennun*.

Plaintiff's effort to compare the quantity and quality of his scholarship with that of selected professors granted tenure in other departments within the Graduate School of Management is also unavailing. This Court is no position to compare the impact of plaintiff's work in his field with the impact of the accomplishments of tenure recipients in other disciplines. That certain non-Israeli professors in other departments may have been granted tenure having published slightly fewer works is not sufficient to support a reasonable inference of discrimination based on national origin. The record does not show that Seneca or Lawrence discriminated against any other "qualified" Israeli tenure candidate or affirmatively exhibited any form of anti-Israel bias through their conduct. The three Israeli candidates to whom plaintiff refers all eventually obtained tenure, presumably with the advice of Seneca and Lawrence.

Consequently, after viewing the evidence in the light most favorable to the plaintiff, the Court concludes that "the record shows no more than a denial of promotion as a result of a dispute over qualifications" among various evaluators, including Seneca and Lawrence. *Molthan*, 778 F.2d at 962. Seneca and Lawrence were not the only critics of plaintiff's scholarship record. Although the external letters of reference were for the most part positive, some expressed concern with the number of works Harel produced. In addition, the department members who changed their vote in 1994 noted a decline in Harel's productivity and potential since his previous tenure bids. *See* Peirano Certif., Exhs. X and Y.

The Court concludes that Harel has failed to produce evidence to allow a reasonable fact finder to discredit the defendants' proffered reason for again denying him tenure in 1995. No rational juror could conclude that Seneca and Lawrence fabricated their opinion concerning the quality of Harel's scholarship in order to camouflage their purposeful

discrimination against him based on his Israeli origin. There is no evidence from which a reasonable juror could build the bridge to the circumstantial conclusion that the acts of the individual defendants were a pretext to discriminate against Harel because of his nationality. Nothing in the record suggests that his national origin was more likely than not the motivating force behind the determinations by Seneca and Lawrence. Therefore, the Court grants summary judgment to defendants Seneca and Lawrence with regard to the equal protection claim.[10]

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[10] Because the Court dismisses plaintiff's § 1983 equal protection claims against Seneca and Lawrence, there is no need to address their argument that they are entitled to qualified immunity.

III. HAREL'S SUBSTANTIVE DUE PROCESS CLAIM

In his third and final cause of action, plaintiff alleges that "[b]y subjecting [him] to arbitrary and capricious deprivation of tenure and promotion, defendants have each deprived plaintiff of substantive due process, as guaranteed by the Fourteenth Amendment to the United States Constitution." Amended Compl. ¶ 46. The protection of substantive due process only extends to deprivations of property and liberty interests encompassed by the Fourteenth Amendment. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). The threshold issue then is whether the defendants' decision not to grant Harel tenure denied him of a "property" or "liberty" interest within the meaning of the Constitution.

The Supreme Court has found that the mere expectancy of future employment does not give rise to a constitutionally protected property interest. *See Perry v. Sindermann*, 408 U.S. 593, 603 (1972); *Roth*, 408 U.S. at 577. To have a property interest in promotion to a particular position, the plaintiff must have more than an "abstract need" or a "unilateral expectation" to receive the advancement. *Roth*, 408 U.S. at 577. He must instead demonstrate that he had "a legitimate claim of entitlement" to tenure. *Id.* That the University has established procedures to regulate the evaluation process does not necessarily create a property interest protected by the Due Process Clause, although violation of such procedures could give rise to a breach of contract claim. *See Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1314 (3d Cir. 1987).

In *Varma v. Bloustein*, 721 F. Supp. 66 (D.N.J. 1988), the court addressed whether Rutgers' tenure evaluation procedures created a protected property interest. The court found that the tenure criteria set forth in the University's regulations and instructions required evaluators to make various subjective judgments and that tenure appointment was far from automatic. It concluded that the guidelines set forth did not "provide the significant substantive restrictions

on University discretion in tenure appointments required to create a protected property interest." *Id.* at 70. Given the subjective nature of the review process, a professor could not have "a reasonable expectation of an automatic grant of tenure[.]" *Id.* at 71.

This Court agrees with the analysis employed in *Varma*. The University Policy with Respect to Academic Promotions specifically provides that advancement to higher positions such as associate professor with tenure "is not automatic." Peirano Certif. Exh. A at 4. To assess a candidate's accomplishments in teaching, service, and scholarship necessarily involves subjective judgment and the substantial exercise of discretion. The regulations and guidelines in no way create the type of clear, nondiscretionary "entitlement" to tenure that the Supreme Court has found to be necessary to establish a constitutionally protected property interest. Other circuits have also concluded that a university's procedures for tenure review do not create a property interest and that alleged deviations from these standards do not give rise to a due process claim. *See Dube v. State Univ. of New York*, 900 F.2d 587 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991); *Goodisman v. Lytle*, 724 F.2d 818 (9th Cir. 1984); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981); *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

Harel also has no protected liberty interest to receive tenure. The Supreme Court has rejected the concept of some general liberty interest in obtaining specific employment. *See Roth*, 408 U.S. at 573. Plaintiff has not shown that his denial of tenure "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* Nor has he produced evidence to suggest that the University has in any way damaged his "good name, reputation, honor, or integrity" so as to inhibit his ability to seek academic positions at other educational institutions. *Id.* Consequently, the decision to deny Harel tenure does not implicate a constitutionally protected liberty interest.

Because plaintiff has no such protected property or liberty interest, the defendants did no violate the Due Process Clause through their actions. Harel's substantive due process claim is also dismissed.

Conclusion

For the foregoing reasons, the Court grants summary judgment to Rutgers, Seneca, Lawrence and dismisses all claims against them.

SO ORDERED.

(2)

No. 99-741

Supreme Court, U.S.
FILED
DEC 13 1999
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IN THE

Supreme Court of the United States

DR. ARIE HAREL,

Petitioner,

v.

DR. FRANCIS LAWRENCE and JOSEPH SENECA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT TO QUESTION PRESENTED

Did the Court of Appeals err by analyzing petitioner's personal liability claims under § 1983 against the individual respondents under an actual knowledge and acquiescence standard?

LIST OF PARTIES TO THIS PROCEEDING*

Petitioner:

DR. ARIE HAREL

Respondents:

DR. FRANCIS LAWRENCE
DR. JOSEPH SENECA

---

* Rutgers, The State University was a party defendant in the proceedings below. The United States District Court for the District of New Jersey granted Rutgers, The State University's motion for summary judgment on all counts. The Third Circuit affirmed and Petitioner Dr. Arie Harel has not sought to challenge that ruling in his petition to this Court. Thus, Rutgers is not a respondent herein.

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Respondents Francis Lawrence and Joseph Seneca respectfully request that this Court deny the petition for a writ of certiorari. This is a garden variety employment case and the petition raises no "compelling reasons" for granting a writ of certiorari. Rather, it simply challenges the lower courts' correct application, to the particular facts of this case, of well-settled Supreme Court and Courts of Appeals decisions governing the personal liability of individual supervisors under 42 U.S.C. § 1983. As shown herein, the decision of the Third Circuit below follows those of this Court, is consistent with the standard applied by other Courts of Appeals and should be left undisturbed.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Dr. Arie Harel, instituted this action on October 6, 1995 against Rutgers, The State University; its President, Dr. Francis Lawrence; and its Executive Vice President, Dr. Joseph Seneca. In his Amended Complaint (JA698)[1], filed on August 19, 1996, Harel alleged, *inter alia*, that respondents violated 42 U.S.C. § 1983 by denying him equal protection of the laws on the basis of his national origin as guaranteed by the Fourteenth Amendment to the United States Constitution. More specifically, Harel alleged that he was denied tenure and promotion to the position of Associate Professor in 1993 and again in 1995 because of his Israeli national origin. Further,

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1. "JA" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit; "Pet. App." refers to the Appendix to the Petition; "PW" refers to the Petition for a Writ of Certiorari filed herein; and "PB" and "PRB," respectively, refer to Harel's Appellant's Brief and Appellant's Reply Brief filed with the Third Circuit.

Harel alleged that this denial was part of a practice and custom by respondents of applying more stringent standards to the consideration of Israeli candidates for promotion and tenure than to other candidates. In addition, Harel alleged that the actions of respondents Seneca and Lawrence in recommending against Harel's candidacy for promotion and tenure "were intentionally discriminatory", "intentionally carried forward the documented and known effects of discrimination on the basis of national origin which occurred at earlier stages of the review process" and were motivated by "malice and prejudice." (JA698, 702 at ¶¶33, 34 and 37).

Respondents denied all material allegations, and specifically denied that Harel was treated differently on the basis of his national origin when he was evaluated for promotion. Instead, as respondents demonstrated in their motion for summary judgment, Harel was not promoted because the quantity and impact of his scholarship did not satisfy the University's promotion standards (Pet. App. C-39).

In its April 24, 1998 Opinion and Order, the district court granted summary judgment to Rutgers and respondents Seneca and Lawrence dismissing all of Harel's claims (Pet. App. B-1).[2] With respect to Harel's § 1983 claim against Rutgers, the district court concluded that Harel had failed to produce evidence sufficient to support a rational inference that a policy or custom of anti-Israeli discrimination existed at Rutgers, or that he was denied tenure as the result of such a policy or custom and, therefore, dismissed Harel's claim against the University (Pet. App. C-34 - C-36). Consistent with the explicit allegations of the Amended Complaint, the district court treated Harel's claim that respondents Lawrence and Seneca's

2. The decision of the district court is reported at 5 F. Supp. 2d 246 (D.N.J. 1998).

actions were intentionally discriminatory not as a claim of supervisory liability, but as an assertion that they personally committed a constitutional tort by recommending against Harel's promotion due to anti-Israeli animus (Pet. App. C-36). The district court considered Harel's allegations that procedural deviations at the lower levels of the evaluation process evidenced anti-Israeli animus and concluded that Harel had failed to produce any evidence linking respondents Lawrence or Seneca to "alleged deviations from the standard consideration procedures." (Pet. App. C-40 - C-41). Rejecting Harel's contention that Lawrence and Seneca recommended against his promotion as a result of anti-Israeli bias, the court concluded that "Harel has failed to produce evidence to allow a reasonable fact finder to discredit the defendants' proffered reason for again denying him tenure in 1995." (Pet. App. C-43).[3] Further, the court concluded that there was "no evidence in the record from which a reasonable juror could build the bridge to the circumstantial conclusion that the acts of the individual defendants were a pretext to discriminate against Harel because of his nationality" and, therefore, granted summary judgment dismissing Harel's § 1983 claim against respondents Lawrence and Seneca (Pet. App. C-44).

Harel appealed to the United States Court of Appeals for the Third Circuit from the April 24, 1998 decision. Consistent with the allegations of his Amended Complaint that respondents Lawrence and Seneca had themselves intentionally discriminated against him, Harel did not contend on appeal that the district court erred by treating his § 1983 claims against respondents as being premised upon a theory of direct, rather than supervisory, liability. Nor did Harel contend that the

3. The district court dismissed Harel's § 1983 claim relating to the 1993 promotion evaluation on the ground that it was barred by the statute of limitations (Pet. App. C-33).

individual liability under § 1983 of those respondents should be measured under a deliberate indifference standard (PB27 and PRB17-20).

By Memorandum Opinion dated August 4, 1999, the Third Circuit affirmed the judgment of the district court in its entirety (Pet. App. A-1 - A-9).[4] The Third Circuit held:

> . . . Harel did not produce evidence to indicate that his deprivation of tenure was a direct result of an official Rutgers policy or custom against persons of Israeli national origin and he did not produce evidence that President Francis Lawrence and Vice-President Joseph Seneca, the individual defendants, had actual knowledge of any discriminatory conduct against him or that they acquiesced in any such conduct and as a result Harel failed to establish his § 1983 claim.

(Pet. App. A-4 n.2).

Harel's new argument that the Third Circuit erred by failing to assess the § 1983 personal liability of respondents Lawrence and Seneca under a deliberate indifference standard is the sole issue which he asks this Court to consider.

B. Facts

Harel was born in Czechoslovakia and became an Israeli citizen in 1948 (Pet. App. C-2). He was hired by Rutgers in September 1985 as an Adjunct Assistant Professor (Pet. App.

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4. Since Harel has not petitioned this Court for review of the lower courts' rejection of his claims against Rutgers, the University no longer is a party to this action. Drs. Lawrence and Seneca are the only remaining respondents.

C-2) and was appointed to the position of Assistant Professor in July 1987 (Pet. App. C-2).

Tenure Process at Rutgers

Rutgers utilizes a multi-level evaluation process to determine whether to award tenure to members of its faculty. The University Policy with Respect to Academic Promotions ("Policy") recognizes that great care must be exercised in promoting faculty to the tenured ranks because the grant of tenure is the most critical step in the promotion process (JA110). The Policy provides that only "those faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for [tenure]. . . . Advancement to a higher rank is not automatic." (Pet. App. C-2). Further, the Policy provides that teaching, scholarship, and service should be considered in deciding whether to grant tenure (Pet. App. C-2). Under the Policy, the research and scholarly accomplishments of a candidate for promotion to the rank of Associate Professor with tenure should have a national impact upon the candidate's discipline (JA106). The Policy explicitly directs evaluators to utilize subjective judgment in assessing the qualifications of candidates for promotion (JA108-09).

The first evaluation is conducted by tenured faculty from the candidate's academic department (Pet. App. C-4).[5] A positive departmental recommendation requires a positive vote by a minimum of two-thirds of those voting (Pet. App. C-5). The candidate's promotion packet, including the departmental

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5. In the discretion of the candidate's department, a reading committee may be appointed to review the candidate's scholarly work and prepare a written assessment thereof for the department's consideration (JA139).

report, is then submitted to the dean's Advisory Committee on Appointments and Promotions ("A&P") (Pet. App. C-5). After receiving the advice of the A&P Committee, the dean evaluates the candidate and makes an independent recommendation concerning the candidate's promotion (Pet. App. C-5). If the recommendations from the dean and the departmental committee both are negative, the candidate's promotion packet is not further evaluated and the candidacy fails (JA126, 141, 374).

If either the dean's or the departmental committee's evaluation is positive, the candidate's promotion packet advances to the next level, the Promotion Review Committee ("PRC") (Pet. App. C-5). The PRC evaluates candidates from a University-wide perspective (Pet. App. C-5). The members of the PRC exercise independent judgment as to the candidate's qualifications and then make a collective recommendation to the University President on whether to grant tenure and/or promotion (Pet. App. C-5 - C-6).

The University President engages in an independent review of each candidate, and then makes a recommendation whether to grant tenure and/or promotion to the University's Board of Governors, which by statute has the sole authority to grant tenure and promotion within the tenured ranks (Pet. App. C-6).

1993 Evaluation for Tenure

Harel was evaluated for tenure in the 1992-93 academic year (Pet. App. C-6). Since his prior unsuccessful candidacy in 1991[6], Harel produced only two refereed journal articles, one

6. Harel did not receive tenure after an evaluation in 1991, but never grieved the denial, filed an administrative charge or lawsuit, or otherwise contended that the denial was unlawful or discriminatory (Pet. App. C-6).

of which was co-authored. Together, these articles totaled six pages (*compare* JA70 at ¶49 with JA594 at ¶49). Harel's promotion packet included fourteen letters from external evaluators, some of which supported promotion and others expressed concern with Harel's relatively small number of publications (Pet. App. C-7).

Dr. Nabil Adam, the chair of Harel's academic department, appointed two tenured faculty members from Harel's department, Dr. Michael Katehakis and Dr. Ted Szatrowski, to serve as Harel's reading committee (Pet. App. C-7). The department voted in favor of tenure; however, the departmental report rated Harel's scholarship as only "average to above average" (Pet. App. C-7 - C-8). While the A&P Committee and the Dean supported tenure, the PRC recommended against tenure, concluding that: "Professor Harel's record since being appointed as Assistant Professor indicates only a moderate publication level and there is some concern about the long term significance and impact of his work. . . ." (Pet. App. C-8). President Lawrence concurred (Pet. App. C-8). Harel was informed on April 6, 1993 that he had not been granted tenure (Pet. App. C-8).

1993 Grievance

On August 18, 1993, Harel filed a grievance pursuant to the University's collectively-negotiated agreement with the local chapter of his union, the American Association of University Professors ("AAUP agreement"), concerning the 1993 tenure denial (Pet. App. C-8 - C-9).[7] He complained that a rigorous

7. Harel's petition does not seek review of the lower courts' ruling that his claims concerning the 1993 evaluation are time-barred (*See* Pet. App. A-4 n.2 and C-33). However, because Harel asserts that his 1993 evaluation and grievance are relevant to the assessment of the respondents'§ 1983 liability for his 1995 tenure denial, we include a brief discussion here.

and fair review of his work had not occurred and that there were procedural errors in the handling of certain materials that he deemed favorable. Nowhere in his grievance did Harel charge that the tenure denial was motivated by national origin discrimination (Pet. App. C-9).

The validity of all but three of Harel's grievance allegations never was determined by the faculty grievance committee because Harel voluntarily withdrew them as part of a remand agreement with the University before findings were made (Pet. App. C-9; JAA186). In its findings concerning the three remaining allegations, the grievance committee concluded that Harel had failed to prove all but one, *i.e.*, that a single member of Harel's department, Professor Szatrowski, had acted with enmity during Harel's 1993 review (JA190, 195).

Under the remand agreement (JA186), Harel's promotion packet would be returned to his department for another evaluation in which Professor Szatrowski would not participate (Pet. App. C-9 - C10). The remand agreement further provided that the decision on remand would be based on the materials submitted in the 1993 promotion packet, a letter submitted by Harel to update the status of the listed works in progress, and a personal statement. Pursuant to the remand agreement, Harel's promotion packet for the remanded evaluation also contained a copy of the grievance committee's findings (Pet. App. C-10). Thus, with respect to Harel's 1993 grievance allegations, his promotion packet for the remanded evaluation showed only that a single allegation had been sustained against one department member who was recused from participation in the 1995 remanded evaluation.

1995 Evaluation for Tenure

Harel received a remanded evaluation during the 1994-95 academic year in accordance with the remand agreement. In a memorandum updating his scholarship since the 1993 evaluation, Harel listed only one new publication and the acceptance for publication of one previously-listed paper (Pet. App. C-10). Dr. Hannoch Levy, an Israeli, and Dr. Ronald Armstrong, a non-Israeli, were appointed to serve on Harel's reading committee (Pet. App. C-11). Both are Harel's friends and "close colleagues" (JA326-27). In the departmental vote taken in December 1994, four members of the department voted to recommend Harel for tenure and promotion, three voted against and one abstained (Pet. App. C-11). Pursuant to the University's Academic Reappointment/Promotion Instructions, two-thirds of the department's members must vote in favor of a candidate for the department to recommend promotion and tenure (Pet. App. C-5). Since fewer than two-thirds of Harel's department voted in favor of promotion, the department did not recommend that Harel be awarded tenure and promotion (Pet. App. C-11). The A&P Committee and the Dean, P. George Benson, recommended promotion (Pet. App. C-11 - C-12).

By memorandum to University President Lawrence dated March 23, 1995, the PRC, through its non-voting Chair, Dr. Joseph Seneca, advised that it did not recommend that Harel be promoted with tenure (Pet. App. C-12). In that memorandum, the PRC stated that:

> Professor Harel's record over this period does not demonstrate sufficiently substantial productivity and, although his contributions are respected by external peers, it is not apparent from the record that his work has had a significant national impact on developments in his field.

(Pet. App. C-12).

President Lawrence also declined to support Harel for promotion and tenure (Pet. App. C-12). The University notified Harel that he had not been granted tenure on April 14, 1995 (Pet. App. C-12).

1995 Grievance

On May 19, 1995, Harel filed a grievance under the AAUP agreement concerning the results of the remanded evaluation (Pet. App. C-12). He charged that the PRC had evaluated the materials submitted in support of his candidacy in an arbitrary and capricious manner and that the PRC's conclusion that his scholarship lacked sufficient productivity and significant impact contradicted the findings reached at other levels of the evaluation process (Pet. App. C-12). He also alleged that certain members of his department had acted in an arbitrary and capricious manner by changing from a positive vote in 1993 to a negative vote in 1995 (Pet. App. C-13). In addition, he accused the University of not taking proper steps to locate two "missing" letters in support of his 1990-91 candidacy (Pet. App. C-13). Finally, Harel charged that Department Chair Adam had omitted from his promotion packet on remand a positive internal letter and, instead, had placed it in supplementary materials not available to the PRC for review (Pet. App. C-13). Once again, Harel nowhere stated in this second grievance that the tenure denial was motivated by national origin discrimination (Pet. App. C-13).

As provided in the AAUP agreement, Harel's grievance was heard by the Faculty Appeals Board ("FAB"), a body of appointed faculty members charged with hearing grievances from remanded evaluations (Pet. App. C-13). Whether or not the FAB finds that there was error in a remanded evaluation, it may either order another evaluation or recommend to the President that the candidate receive tenure (Pet. App. C-13).

In its recommendations issued on June 22, 1995, the FAB rejected Harel's allegation that the PRC acted in an "arbitrary and capricious" manner in denying tenure (Pet. App. C-13). While asking the President to consider its ultimate recommendation, the FAB concluded that:

> There is no evidence that the PRC did not carefully consider the materials provided in Prof. Harel's promotion packet in making its decision.

(JA212).

The FAB also rejected Harel's allegation that "some" members of his department acted in an arbitrary and capricious manner because they did not vote to support him for tenure (Pet. App. C-13). As to Harel's allegation that the University did not take "sufficient steps" to obtain two "missing" outside reference letters, the FAB noted that one of the letters was obtained by the University, and included in the remand packet (JA214). The FAB also rejected Harel's belated claim of "Enmity by an evaluator during 1990-1991 [sic] tenure review" (JA216).

The FAB found that an internal letter of evaluation (*i.e.*, one from Benjamin Avi-Itzak, Harel's friend and colleague) was placed in "supplementary materials" (Pet. App. C-14). However, Harel conceded that "supplementary" packet material is available to, and reviewed by, the PRC (JA307-08). After rejecting Harel's key allegations (*i.e.*, alleged arbitrary action and the charge of "enmity"), the FAB nevertheless recommended that Harel be awarded tenure (Pet. App. C-14).

Thereafter, Harel's tenure candidacy was submitted to President Lawrence for review, as provided for in the AAUP Agreement (Pet. App. C-14). By correspondence to Harel dated

July 26, 1995, President Lawrence disagreed with the FAB's recommendation, stating, *inter alia*, that "the record of accomplishments presented is not sufficient to support [promotion]" (Pet. App. C-14). The Board of Governors accepted President Lawrence's recommendation not to award Harel tenure or promotion (JA334).

On September 13, 1995, Harel filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging for the first time, *inter alia*, that he was denied tenure in 1995 on account of his national origin (Pet. App. C-15).

REASONS FOR DENYING THE WRIT

The Lower Courts' Decision That Harel's § 1983 Claim Against Respondents Lawrence And Seneca Failed For Lack Of Evidence That They Had Actual Knowledge Of Any Discriminatory Conduct Against Him Or Acquiesced In Any Such Conduct Is A Correct Application Of The Decisions Of This Court To The Specific Facts Of This Case And Is Consistent With The Decisions Of The Other Courts Of Appeals.

Harel's petition contends that the Third Circuit's ruling below — that his § 1983 claim against respondents Lawrence and Seneca failed for lack of evidence that they had actual knowledge of alleged discriminatory conduct against him or acquiesced in such conduct (Pet. App. A-4 n.2) — "ignores well-settled Supreme Court and inter-circuit authority governing supervisory liability under § 1983" and marks a split among the Circuits that should be resolved by a grant of certiorari in this case (PW14-15).

The sole identified basis for Harel's contention that the Third Circuit's decision ignores the decisions of this Court is

his assertion that *Canton v. Harris*, 489 U.S. 378, 388 (1989), held and, thus, required the Third Circuit to hold below, that individual governmental officials may be personally liable under § 1983 for "deliberate indifference" to constitutional rights (PW15). Harel's contention that the Third Circuit's decision conflicts with those of other Courts of Appeals concerning the scope of "*Canton*'s deliberate indifference test" appears to be based upon the argument that the Third Circuit failed to apply a deliberate indifference test in this case and, in its other decisions, has declined to apply a deliberate indifference analysis in as broad a range of circumstances as have other Courts of Appeals. As shown below, Harel's petition must be denied because both of these contentions are wrong.

At the outset, however, Harel's petition must be denied for another reason: he never presented to the courts below his contention that his personal liability claims against respondents Lawrence and Seneca should be evaluated under a "deliberate indifference" standard. Harel's Amended Complaint expressly alleges that respondents Lawrence and Seneca *directly* participated in *intentional* misconduct against him (JA702 at ¶¶33, 34 and 37). Following the district court's dismissal of his § 1983 claim on summary judgment, on appeal Harel did not further press his direct tort theory against respondents, but instead, urged a supervisory liability theory. In his brief before the Third Circuit, Harel did not ask the court to evaluate his claims against respondents Lawrence and Seneca under a deliberate indifference standard. Instead, Harel made the following argument regarding the personal liability of respondents Lawrence and Seneca:

> To sustain constitutional claims against individual state actors, Dr. Harel must show that they intentionally acted in derogation of a clearly established right of which a reasonable person in

> their position would have had knowledge. Dr. Harel may also prevail against these defendants by establishing that they knowingly failed to act in a manner which permitted others, under their supervision or direction, to violate such rights. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (requiring allegations of individual involvement or acquiescence to be made with reasonable particularity).[8]

(PB27). Moreover, Harel's reliance on *Rode* cannot be viewed as urging the Third Circuit to apply a deliberate indifference standard because *Rode*, 845 F.2d at 1207, expressly requires a showing of "actual knowledge and acquiescence" to make out a supervisory liability claim. Accordingly, it is clear that Harel did not raise his deliberate indifference theory below. Plainly, Harel twice has sought to shift the theory of his § 1983 claim in order to obtain another bite at the apple.

Harel's failure to raise his "deliberate indifference" argument before the lower courts requires that the petition be denied. It is well-settled that this Court will not consider issues which were not presented or resolved in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily this Court does not decide questions not raised or resolved in the lower court."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same). Harel should not be permitted to argue for the first time in his petition that the Third Circuit should have applied a "deliberate indifference" standard for supervisor

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8. Contrary to Harel's reading of *Rode*, the Third Circuit held in that pre-*Canton* decision that the personal involvement necessary to hold a defendant liable in a § 1983 action may be shown "through allegations of personal direction or of actual knowledge and acquiescence." 845 F.2d 1195, 1207 (3d Cir. 1988).

liability, rather than the standard that Harel himself urged that court to apply.

Accordingly, the petition must be denied.

1. The Third Circuit's Decision Below Is Consistent With This Court's Decisions Concerning Personal Liability Under § 1983.

If this Court proceeds to consider the new argument raised in Harel's petition, his assertion that the Third Circuit's ruling below conflicts with *Canton v. Harris* is wrong. Contrary to Harel's contention, *Canton* did not address the liability under § 1983 of individual governmental supervisors. Rather, the *Canton* Court was presented with, and decided in the affirmative, the question whether a municipality may be held liable under §1983 for its failure to train municipal employees where that failure both causes a constitutional deprivation and reflects a deliberate indifference to the constitutional rights of its inhabitants. 489 U.S. at 392. No decision of this Court has held that the "deliberate indifference" standard is the sole test which must be applied regardless of the factual circumstances presented in considering the personal liability of a governmental supervisor under § 1983. Therefore, the decisions of this Court did not require the Third Circuit to apply a deliberate indifference test.

Contrary to Harel's contention, the decision below is fully consistent with the decisions of this Court. To establish personal liability in a § 1983 action, it must be shown that "the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). In considering the circumstances under which a governmental supervisor may be

held personally liable under 42 U.S.C. § 1983, the starting point must be the statute itself, which provides, in relevant part:

> [e]very person who under color of [law] subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] suit in equity . . .

As this Court explained in *Rizzo v. Goode*, 423 U.S. 362, 370-371 (1976): "[t]he plain words of the statute impose liability . . . only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and the laws." Thus, this Court has rejected § 1983 claims premised on theories of respondeat superior and held that a defendant in a civil rights action must have personal involvement in the alleged wrongs in order to be held liable. *Monell v. Department of Social Services*, 436 U.S. 658, 691-693 (1978); *Rizzo v. Goode*, 423 U.S. at 370-371; *Parratt v. Taylor*, 451 U.S. 527, 537 n.3 (1981). It follows that a §1983 plaintiff seeking to attach liability to a supervisor for the acts of one of his or her subordinates "may not rest on the [supervisory] relationship alone; both fault and causation *as to the acts or omissions of the* [supervisor himself] must be proved." *Canton*, 489 U.S. at 394 (O'Connor, J., concurring in part and dissenting in part) (emphasis in original).

Thus, the Third Circuit's ruling that Harel's § 1983 claim is deficient because he failed to produce evidence that respondents Lawrence and Seneca had actual knowledge of or acquiesced in alleged discriminatory conduct purportedly perpetrated by lower level evaluators is fully consistent with this Court's conclusion in *Rizzo v. Goode* that personal

involvement of governmental officials must be shown to support individual liability under § 1983.

2. The Third Circuit's Decision Below Is Consistent With The Decisions of the Other Courts of Appeals.

Moreover, Harel's contention that a split exists between the Third Circuit and the other Courts of Appeals concerning the supervisory liability standards under § 1983 simply is wrong. As shown above, the Third Circuit did not reject or refuse to apply a deliberate indifference standard in this case. The court had no occasion to consider the appropriateness of such a standard because, from the filing of his Amended Complaint and throughout the proceedings before the Third Circuit, Harel never pursued his § 1983 claim against respondents on a deliberate indifference theory. Instead, he first asserted that respondents intentionally overlooked the alleged misconduct of lower level evaluators and recommended against Harel's promotion because of their own intentional discriminatory animus, and later contended that they knew of and acquiesced in subordinates' misconduct. To debate whether the Third Circuit would have deemed it appropriate to apply a deliberate indifference standard had Harel presented such a theory of liability is an exercise in conjecture that does not warrant a grant of certiorari.

As should be expected given the widely-varying factual patterns and theories of liability presented, the decisions of the Third Circuit analyzing the nature and extent of personal involvement necessary to support the personal liability of supervisors under § 1983 have defined a range of circumstances in which the necessary involvement may be shown. The Third Circuit has held that personal involvement may be shown "through allegations of personal direction or of actual

knowledge and acquiescence," *Rode v. Dellarciprete*, 845 F.2d at 1207, "or through direct discrimination by the supervisor." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Further, the Third Circuit has applied a deliberate indifference standard in assessing the individual liability of government supervisors in appropriate §1983 cases. *See e.g.*, *Sample v. Diecks*, 885 F.2d 1099, 1116-18 (3d Cir. 1989) (In the context of a §1983 action against prison officials for unconstitutional detention, applying the "deliberate indifference" standard as established in *Canton* to the assessment of the individual liability of supervisory public officials.); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725 (3d Cir. 1989) (Holding, under *Canton*, that a school official may be held liable in an individual, as well as an official, capacity when the official, with deliberate indifference to the consequences, establishes or maintains a policy, practice or custom that plays an affirmative role in causing a deprivation of the constitutional rights of a student.), *cert. denied*, 493 U.S. 1044 (1990); *Black v. Indiana Area School Dist.*, 985 F.2d 707, 711-13 (3d Cir. 1993) (Holding that plaintiffs had failed to establish the individual §1983 liability of the supervisor defendant under deliberate indifference standard.); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999) (Holding, in the context of a claim against policymakers in the District Attorney's Office in their personal capacities for failure to train or supervise municipal employees, that liability under § 1983 requires a showing that the failure amounts to "deliberate indifference" to the rights of persons with whom these employees will come into contact.), *cert denied*, __ U.S. __ No. 99-481, 1999 U.S. LEXIS 7545 (Nov. 15, 1999).

In other decisions, although recognizing the continued viability of the deliberate indifference standard, the Third Circuit has held that theory inapplicable where the absence of evidence

showing a pattern of subordinate misconduct made it inappropriate to impute constructive knowledge thereof to the supervisor. *See Brown v. Grabowski*, 922 F.2d 1097, 1120 n.16 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991); *Baker v. Monroe Township*, 50 F.3d 1186, 1191 n.3 (3d Cir. 1995).

Fully consistent with the Third Circuit, depending on the facts presented, other Courts of Appeals have concluded that personal involvement sufficient to support individual liability of a supervisor under § 1983 may be established through involvement ranging from direct participation to deliberate indifference. *See Barreto-Rivera v. Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999) (Holding that § 1983 claim against individual supervisory official may be proved upon a showing that the official directly participated in the actions complained of, knew of subordinates' unconstitutional behavior and condoned or tacitly authorized such conduct, or had a basis for knowing of subordinates' misconduct and acted with deliberate indifference to the consequences.); *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997) ("A supervisory official is liable for a constitutional violation if he or she (1) directly participated in the violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation or allowed the custom or policy to continue after learning of it; or (4) was grossly negligent in supervising subordinates who caused the violation."); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (Holding that supervisors will be liable under § 1983 only upon proof of their direct culpability in causing injury to the plaintiff which may be shown by evidence that the supervisor either: (1) directly authorized subordinates' conduct, (2) expressly condoned by inaction a known pattern of comparable conduct, or (3) knew or reasonably should have known of a comparable pattern of misconduct and in the face

of that knowledge took no action to stop it but remained deliberately indifferent to it.), *cert. denied*, 519 U.S. 819 (1996); *Sanders v. English*, 950 F.2d 1152, 1159-60 (5th Cir. 1992) (Supervisory official may be held liable under § 1983 for wrongful acts of subordinates if he or she knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he or she might see.); *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998) (Holding that plaintiff must prove that supervisors did more than play a passive role in the alleged violation or showed mere tacit approval of the events for individual liability under § 1983 to attach. Plaintiff must show that supervisors otherwise encouraged or condoned the actions of the other defendants.), *reh'g en banc denied*, 1998 No. 97-5468 U.S. App. LEXIS 31335 (6th Cir. Oct. 29, 1998), *cert. denied*, __ U.S. __, 143 L. Ed. 2d 793 (1999); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997) (Holding that liability of supervisors for conduct of subordinates under § 1983 must be predicated on personal involvement which can be shown in a number of ways: "supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference."); *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) (Holding that for a supervisor to be held individually liable for the acts of a subordinate, something more must be shown than merely the existence of the supervisor-subordinate relationship and mere negligence in failing to detect and prevent a subordinate's conduct is not enough for liability under § 1983 to attach. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.), *reh'g denied*, 93-1972SIDM 1994 U.S. App. LEXIS 12756 (8th Cir. June 1, 1994); *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (Holding that a supervisor can be liable under § 1983 in his individual capacity for (1) his own culpable action

or inaction in the training, supervision or control of his subordinates, (2) for his knowing acquiescence in the constitutional deprivation, or (3) for conduct that showed a reckless or callous indifference to the rights of others.); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) (To establish a supervisor's liability under § 1983, the plaintiff must show that the supervisor either (1) personally participated in the constitutional deprivation, (2) controlled or directed subordinates to commit the constitutional deprivation, or (3) failed to adequately supervise.); *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995) (To impose individual liability on the defendants under § 1983, plaintiff must allege and prove that defendants "actually knew of and acquiesced in [the subordinate's] behavior."); *Braddy v. Florida Dept. of Labor & Employment Sec.*, 133 F.3d 797 (11th Cir. 1998) (Supervisory liability under § 1983 occurs either when the supervisor personally participated in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fails to do so.).

In sum, decisions of the other Courts of Appeals are entirely consistent with the decisions of the Third Circuit. All of the Circuits recognize that the showing of fault and causation sufficient to justify the imposition of § 1983 liability upon a supervisor for the conduct of subordinates necessarily varies based upon the nature of the factual scenario presented. Further, all of the Circuits apply slightly varying tests depending upon the facts alleged. Quite simply, there is no split among the Circuits on this issue.

Harel also contends that a footnoted comment by a Third Circuit panel in *Baker v. Monroe Township*, 50 F.3d at 1194 n.5, demonstrates that a split exists among the Circuits because "the Third Circuit has expressly applied a narrower liability test than other Circuits." (PW15). This contention is wrong.

Harel correctly notes that the *Baker* panel stated that "other circuits have developed broader standards for supervisory liability under § 1983", *Baker*, 50 F.3d at 1194 n.5, than the actual knowledge and acquiescence standard applied in *Baker*. However, earlier in its opinion, 50 F.3d at 1191 n.3, the *Baker* Court noted that a supervisor also could be held liable under the principles applied in *Stoneking v. Bradford Area School District*, 882 F.2d at 725 (applying deliberate indifference standard to §1983 claims against individual supervisor), but that the facts before the court did "not implicate such a theory." Since the *Baker* Court held that the evidence showed the supervisor defendant did have actual knowledge of the subordinates' conduct, 50 F.3d at 1193-94, and there is no indication that the court was presented with an argument that a deliberate indifference standard should be applied to those facts, the footnoted comment upon which Harel relies is obiter dictum. Moreover, in its post-*Baker* decision in *Carter v. City of Philadelphia*, 181 F.3d 339 at 356, the Third Circuit reaffirmed its holding in *Sample v. Diecks*, 885 F.2d at 1118 (applying *Canton*'s deliberate indifference standard to § 1983 personal liability claim).

In any event, the Third Circuit's decision below, not the *Baker* Court's dictum, is the subject of Harel's petition. In this case, the Third Circuit's decision is not the product of a split among the Circuits concerning the personal liability standard under § 1983. Rather, the Third Circuit evaluated the evidence of record under the particular theory of liability urged by Harel

himself and concluded that his § 1983 claim against respondents was not supported by the record.

Thus, contrary to Harel's contention, from the starting points provided by this Court's decisions, the case-by-case evolution of the Third Circuit's decisional law defining the relationship that must exist between a supervisor's action or inaction and a subordinate's constitutional violation to warrant supervisory liability under § 1983 is consistent with the decisions of this Court and the other Circuits. Accordingly, Harel's petition must be denied.

3. The Petition Must Be Denied For Other Reasons.

Even if the Third Circuit should have applied a "deliberate indifference" standard, rather than an "actual knowledge and acquiescence" standard, this case is not worthy of certiorari. This Court has made clear that "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) [citations omitted]. This case involves the simple application of the law to a discrete factual scenario. It does not involve principles the settlement of which is of public importance, nor does it involve a "real and embarrassing conflict of authority" among the Circuits. As has been shown, there is no such conflict among the Courts of Appeals as to the standard for supervisor liability under § 1983. Accordingly, the petition must be denied.

In addition, Harel's petition must be denied because his contentions concerning application of a deliberate indifference standard are moot due to his failure to prove an underlying constitutional violation. This Court held in *Daniels v. Williams*,

474 U.S. 327, 330 (1986), that "[i]n any given § 1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right. . . . *See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause.)."

Here, however, Harel has failed to produce competent evidence to show the existence of the underlying constitutional violation — that he was discriminatorily denied promotion and tenure because of his Israeli national origin by respondents' subordinates. At this stage of these proceedings, Harel's contention appears to be that respondents Lawrence and Seneca are personally liable for alleged intentional discriminatory conduct by evaluators beneath them in the 1995 evaluation process which purportedly resulted in the unlawful denial of his bid for tenure and promotion. In the proceedings below, the district court applied the three-part test for proving disparate treatment established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and correctly concluded that Harel had not met his burden of producing evidence indicating that respondents Seneca and Lawrence discriminated against him on account of his Israeli national origin (Pet. App. C-41). Further, the district court rejected Harel's assertions that irregularities in the evaluation process showed that Rutgers' non-discriminatory reason for denying Harel promotion and tenure (the University's view that the quantity and impact of his scholarship did not meet its standards for promotion) was a mere pretext for discrimination or that an invidious discriminatory reason more likely than not motivated the University's decision not to grant tenure (Pet. App. C-39-41). These determinations were affirmed by the Third Circuit (Pet. App. A-4), and have not been challenged in Harel's petition. Plainly, the lower courts' decisions dismissing Harel's

§ 1983 discrimination claims against Rutgers prevent him from establishing that a constitutional tort was committed by Rutgers for which respondents Lawrence and Seneca may be held personally liable as supervisors.

Harel's petition also must be denied because his contentions are premised upon serious misstatements of fact. Throughout his petition, Harel asserts either that respondents Lawrence and Seneca knew or that they should have known that the proceedings at the lower levels of the 1995 evaluation process were infected by anti-Israeli bias because of allegedly rampant irregularities that purportedly occurred in the 1993 and 1995 evaluation processes. The evidence shows, however, that Harel's 1993 grievance resulted in only a single grievance committee finding of "enmity" which was remedied by the recusal of the offending professor from the 1995 evaluation (Pet. App. C-9 - C-10; JA186, 195). Moreover, the evidence clearly shows that Harel never contended that his Israeli national origin had anything whatever to do with his tenure denial until he filed his EEOC Charge of Discrimination in September 1995 (Pet. App. C-9, C-13 and C-15), months after the 1995 evaluation concluded. Therefore, nothing that occurred prior to the 1995 remanded tenure evaluation reasonably could have led respondent Lawrence or respondent Seneca to suspect that national origin discrimination had affected Harel's evaluation.

With regard to the 1995 evaluation, Harel contends that respondent Seneca opposed his tenure bid despite the fact that he "knew that the FAB, the highest-level University grievance panel, had identified a myriad of procedural and substantive deficiencies adversely affecting Petitioner's tenure review process" (PW 16 -17). The undisputed evidence shows this allegation to be false. The evidence shows that Dr. Seneca's involvement with Harel's 1995 tenure review ended on March

25, 1995 with his memorandum reporting the PRC's recommendation to the President (Pet. App. C-12; JA 208, 2006). At that time, in March of 1995, it was impossible for Dr. Seneca to know that Harel would later file a grievance in May of 1995 (Pet. App. C-12), or to know the contents of the FAB's then non-existent report, which subsequently issued on June 22, 1995 (Pet. App. C-13). Moreover, the evidence shows that the FAB ultimately rejected Harel's principal allegations (Pet. App. C-13 - C-14). Therefore, Harel's assertion that the FAB's findings provided Dr. Seneca with knowledge of alleged procedural irregularities is false. Further, as the district court's rulings amply demonstrate, Harel never produced evidence sufficient to support a rational inference that national origin discrimination played a role in the tenure denial.

Similarly, Harel falsely attempts to ascribe to respondent Lawrence knowledge which he simply could not have had. For example, Harel contends that respondent Lawrence "rejected his candidacy and recklessly ratified the discrimination previously internalized in the process" despite knowledge that Harel believed that the adverse decisions had been motivated by illegal discrimination (PW19). Harel has produced no evidence which establishes that respondent Lawrence knew, or could have known, that Harel believed his tenure denial was the result of illegal discrimination. At no time during the tenure review process or in his grievance to the FAB did Harel make such an allegation (Pet. App. C-13). The record is absolutely clear on this point. When respondent Lawrence ended his involvement in this matter upon notifying Harel on July 26, 1995 that he was not being granted tenure, Harel had yet to contend that his tenure denial was the product of illegal discrimination. As shown, it was not until months later, on September 13, 1995, in his Charge of Discrimination to the EEOC, that Harel first contended that he had been denied tenure

and promotion due to discrimination on the basis of his national origin (Pet. App. C-15). Thus, Harel's allegation that respondent Lawrence recommended against Harel's promotion candidacy despite knowledge that Harel claimed to be a victim of illegal discrimination is contradicted by the evidence.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

Respectfully submitted,

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